

**Masland Industries, Inc. and Masland Transportation, Inc. and Teamsters Local Union No. 908, affiliated with the International Brotherhood of Teamsters, AFL-CIO.** Case 9-CA-29570

May 26, 1993

**DECISION AND ORDER**

BY CHAIRMAN STEPHENS AND MEMBERS  
DEVANEY AND OVIATT

On February 12, 1993, Administrative Law Judge Robert W. Leiner issued the attached decision. The Respondents filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>1</sup> and con-

<sup>1</sup> The Respondents have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondents contend that the judge failed to give full and fair consideration to the Respondents' evidence and that he took "extraordinary liberty" with the evidence in order to reach a decision consistent with his "preformed conclusions." We have carefully examined the entire record, including the judge's decision, and we are convinced that the judge's conduct does not constitute legal prejudice or even the appearance of partisanship. There is no basis for finding that bias or partiality existed merely because the judge resolved important factual conflicts arising in the proceeding in favor of the General Counsel's witnesses.

In adopting the judge's finding that the discharge of the Sidney drivers violated Sec. 8(a)(3) and (1), we do not rely on the Nations Business article cited in fn. 10 of his decision or on his characterization of that article.

In the remedy section of his decision, the judge incorrectly cited the date of the Board's decision in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and incorrectly cited *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

<sup>2</sup> In finding that Plant Manager Abel's questioning of employee Donnie Freels violated Sec. 8(a)(1), the judge relied, inter alia, on *Raytheon, Inc.*, 279 NLRB 245 (1986). Chairman Stephens dissented in that case and Members Devaney and Oviatt did not participate. We agree with the judge that the questioning in the instant case was coercive, but we find *Raytheon* distinguishable for the following reasons. In *Raytheon*, there was no background of unlawful conduct or any showing of employer hostility to union activity, the questioner was not especially high in the company hierarchy, and he did not initiate the union discussion. Here, the interrogation of Freels followed an unlawful threat by the Respondents to close the trucking operation, and was accompanied by a coercive statement that there was "no future" in the drivers being organized. Further, Abel was a high management official, and he introduced the topic of the employees' union involvement.

clusions<sup>2</sup> and to adopt the recommended Order as modified.<sup>3</sup>

**ORDER**

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondents, Masland Industries, Inc. and Masland Transportation, Inc., Sidney, Ohio, their officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraph 2(b) and reletter the subsequent paragraphs.

"(b) Remove from their files any reference to the discharge of the 16 driver-employees and notify each of them in writing that this has been done and that evidence of the discharge will not be used against them in any way."

2. Substitute the attached notice for that of the administrative law judge.

<sup>3</sup> The recommended Order has been modified to include the Board's traditional expunction remedy. We shall also issue a new notice to employees.

**APPENDIX**

**NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government**

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discharge, subcontract jobs, or otherwise discriminate against you in order to discourage you from joining or supporting Teamsters Local Union No. 908, affiliated with the International Brotherhood of Teamsters, AFL-CIO (the Union), or any other labor organization.

WE WILL NOT promise you benefits if you refrain from choosing the Union, or any other labor organization, as your collective-bargaining representative.

WE WILL NOT threaten you with cessation of operations if you attempt to have a labor organization become your collective-bargaining representative.

WE WILL NOT coercively interrogate you about employees' union sympathies.

WE WILL NOT inform you that it will be futile for you to select the Union or any other labor organization as your collective-bargaining representative.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer the 16 driver-employees terminated on May 2, 1992, employed at the Sidney, Ohio loca-

tion, including Wayne P. Borland, Mark Egbert, Donnie R. Freels, Alfred Grillot, Dennis L. Kitchen, Frederick D. Poppleman, Ernest L. Vestal, Bill Broering, Scott R. Egbert, Warren A. Freels, George J. Grillot, Jack Meinberg, and Neil Schafer, immediate and full reinstatement to their former positions as drivers at the Sidney, Ohio location or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, and WE WILL make each of them whole, with interest, for any loss of earnings and benefits each of them may have suffered as a result of their May 2, 1992 discharge.

WE WILL remove from our files any reference to our discharge of the 16 driver-employees and WE WILL notify each of them in writing that this has been done and that evidence of the discharge will not be used against them in any way.

WE WILL reestablish our trucking operations at Sidney, Ohio, as such operations existed on May 2, 1992, severing any and all subcontracting agreements and operations covering the Sidney trucking operation.

MASLAND INDUSTRIES, INC. AND  
MASLAND TRANSPORTATION, INC.

*Carol L. Shore, Esq.*, for the General Counsel.  
*Walter H. Flamm Jr. and Charles V. Curley, Esqs. (Clark, Ladner, Fortenbaugh & Young)*, of Philadelphia, Pennsylvania, for the Respondents.

## DECISION

### STATEMENT OF THE CASE

ROBERT W. LEINER, Administrative Law Judge. This matter was heard in Dayton, Ohio, on October 28–30, 1992, and November 9, 1992, on the General Counsel's complaint, dated June 19, 1992, as further amended at the hearing, which alleges, in substance, that the above-captioned Masland Industries, Inc. and Masland Transportation, Inc., as a single-integrated employer enterprise (Respondents), independently violated Section 8(a)(1) of the Act by statements of their supervisors and Section 8(a)(3) of the Act by unlawfully terminating the employment of their driver-employees at Sidney, Ohio, the above events occurring in the months of February through May 1992.<sup>1</sup>

Respondents timely filed answers deny certain allegations of the complaint, admit others, but deny the commission of unfair labor practices.

At the hearing, all parties were represented by counsel, were given full opportunity to call and examine witnesses, to submit relevant oral and written evidence, and to argue orally on the record. At the close of the hearing, the parties waived

<sup>1</sup> At the hearing, Respondents conceded that the original charge in this matter was filed by the Union on May 6, 1992, and served on Masland Industries on May 7, 1992. Respondents further conceded at the hearing that the amended charge was filed and served on both above-captioned Respondents on June 11, 1992.

final argument and elected to submit posthearing briefs which had been received and carefully considered.

On the entire record, including the briefs, and on my most particular observation of the demeanor of the witnesses as they testified, comparing such testimony with the testimony of adverse witnesses and the interests of the witnesses, I make the following

## FINDINGS OF FACT

### I. RESPONDENTS AS STATUTORY EMPLOYERS AND A SINGLE EMPLOYER

The complaint alleges, and Respondents at the hearing admitted, that at all material times, Masland Industries, Inc., a corporation, has been engaged in the manufacture of automotive carpeting at its facilities in Sidney, Ohio, and Carlisle and Lewistown, Pennsylvania. Respondents further admit that, at all material times, Respondent Masland Transportation, Inc., a separately incorporated common carrier, has been engaged in interstate transportation of freight, primarily for the products of customers of Respondent Masland Industries. Masland Transportation maintains dispatching and office facilities at Masland Industries' three above production facilities, and a driver in Rexdale, Ontario, Canada.

The complaint further alleges, but Respondents deny, that at all material times, Respondents have been affiliated business enterprises with common officers, ownership, directors, management, and supervision; have formulated and administered a common labor policy, shared common premises and facilities; have provided services for, and made sales to, each other; have interchanged personnel with each other; and have held themselves out to the public as a single-integrated business enterprise. Respondents further deny that they constitute a single-integrated business enterprise and a single employer within the meaning of the Act.<sup>2</sup> Respondents concede, however, that Masland Transportation (M T) is a wholly owned subsidiary of Masland Industries.

### Background

As Respondents observe, the two corporate entities herein were derived from a publicly held employer entity known as C. H. Masland and Sons. That entity was engaged in three separate businesses, one of which was the manufacture of carpeting for the automotive industry. Although there were intermediate ownership transactions, by 1990, the publicly held corporation was taken private and by 1991, the business of the resulting entity was only the manufacture, sale, and delivery of automotive carpeting. Thus, up through August

<sup>2</sup> Respondents at the hearing admitted that in the 12-month period preceding the issuance of complaint, Respondent Masland Industries (M I) in its business of manufacturing automotive carpeting at its several locations, above described, sold and shipped from such facilities goods valued in excess of \$50,000 directly to points outside the States of Ohio and Pennsylvania. Moreover, Respondents also admit that in the same 12-month period, Respondent Masland Transportation, Inc., derived gross revenues in excess of \$50,000 from the transportation of freight for Respondent Masland Industries from its several locations directly to points outside the States of Ohio and Pennsylvania. Lastly, Respondents admit, and I find, that at all material times, each of the Respondents has been an employer engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act.

1991, Masland Industries was engaged in the manufacture of carpet for the automobile industry which carpet was delivered by its own trucks and drivers.

In August 1991, Masland Industries spun off its trucking operations at the above four locations and separately incorporated, as a wholly owned subsidiary, Masland Transportation, Inc. John Rathbun, formally manager of transportation for Masland Industries, was named vice president of Masland Transportation (M T), in charge of its trucking operations at Sidney, Ohio; Lewistown and Carlisle, Pennsylvania; and Rexdale, Ontario, Canada, and responsible for its financial performance.

Respondents statement of the law of "single integrated business enterprise" is, for the most part, unassailable. In this regard, the General Counsel joins Respondents in citing the legal precedents determining the establishment of such a single-integrated enterprise. A single-integrated enterprise, derived from ostensibly separate corporate entities, is characterized by the absence of an "arm's length" relationship found among unintegrated entities. *Blumenfeld Theaters Circuit*, 240 NLRB 206, 215 (1979), enfd. 626 F.2d 865 (9th Cir. 1980); accord: *Fedco Freight Lines*, 273 NLRB 399 fn. 1 (1984). If there is no arm's-length relationship between or among the companies, they may be deemed a single employer. *NLRB v. Browning-Ferris Industries*, 691 F.2d 1117, 1122 (3d Cir. 1982).

Respondents concede that M I and M T have a "close working relationship" (R. Br. 8) and that the Board weighs four factors in ascertaining whether otherwise discrete businesses are sufficiently integrated to be treated as a single-integrated enterprise. Under *Radio Union v. Broadcast Service of Mobile*, 380 U.S. 255 (1965), and its progeny, the four factors are: (1) interrelation of operations; (2) common management; (3) centralized control of labor relations; and (4) common ownership or financial control. Although none of these factors alone is determinative, the Board takes the position that the existence of centralized control of labor relations bears a special weight. *Fedco Freightlines*, supra at fn. 1; *Sakrete, Inc. v. NLRB*, 322 F.2d 902, 905 fn. 4 (9th Cir. 1964), cert. denied 379 U.S. 961 (1965). It should be noted, however, that merely because M T is a wholly owned subsidiary of M I, that legal relationship does not, of itself, cause the parent and subsidiary to constitute a single employer within the meaning of the Act. *Esmark, Inc. v. NLRB*, 887 F.2d 739 (7th Cir. 1989). The General Counsel, even in the presence of M T as a wholly owned corporate subsidiary, must nevertheless prove the existence of a single-integrated employer relationship on the basis of the four above-established Board and Court standards. *Ibid*.

(1) With regard to *common ownership*, the relationship of privately held corporate parent to wholly owned corporate subsidiary eliminates that issue from contention. There is, therefore, common ownership. (2) With regard to *common management*, at all material times, the management of both corporate entities, as the General Counsel observes (and as the Respondents do not contest), has significant similarity: Bill Branch is president of M I and president of M T. Richard Krout, M I's vice president of procurement and supply is a vice president of M T and, in the line of hierarchy, is the superior of Vice President Rathbun (not an officer of M I) who is in daily control of M T. Larry Owen, vice president of operations for M I is vice president of M T without

portfolio. Jim Allgyer is vice president of both corporations. Julia Stout, assistant treasurer of M I, is secretary of M T. Although M I has officers who are not M T officers, all of M T's officers are M I officers. I find that the corporations have common management. (3) With regard to centralized control of labor relations, the third component of Board analysis, Richard Sears, vice president of M I for human resources, not an officer in M T, is nevertheless the actual chief of all labor relations for both M I and M T. He exercises actual control of (Tr. 777-778) M T's labor relations including the negotiation of contracts relating to the wages and working conditions of M T's drivers.

Rathbun, vice president of M T for transportation, does not report on labor relations directly to Sears; he reports to M I and M T Vice President Richard Krout on labor relations. As M I Vice President Richard Sears testified, however, although Rathbun might report to Krout on labor relations, M I-M T Vice President Krout is not experienced in, nor responsible for, either corporation's labor relations (Tr. 778). It is Sears and Sears alone who calls the shots for all labor relations activities in the various subsidiaries of M I and particularly in M T. M T Vice President Rathbun erroneously, but perhaps understandably, believed that M I Vice President Sears (human relations) was also a vice president and officer of M T (Tr. 54-55). However, Rathbun's later testimony (Tr. 57) (contradicting, in substance, Sear's testimony (Tr. 778)) that "basically" Rathbun himself was in charge of labor relations at M T, was a purposeful but unnecessary lapse in credibility. As Sears testified, Sears is in charge of all M T's (and M I's) labor relations. I regard Rathbun's contrary testimony as reflecting unfavorably on his credibility, perhaps designed to defend against proof of the single-integrated nature of the two corporations. If any other individual was immediately responsible for labor relations at M T, it was, as will be seen, M I's plant manager, Richard Abel. The only human resources representative at the Sidney, Ohio plant dealing directly with M T's employees was an employee of M I, Amelia Pauley, who administered the company benefit plans for both M I and M T without distinction.

With regard to labor relations involving the instant unfair labor practices Respondents essentially disregarded the distinction between M T and M I. In dealing with the M T driver unit at Sidney, Ohio, the participants were M I Vice President Sears; Rathbun (vice president of M T); Abel (plant manager of M I without any portfolio in M T); John Walden, M T dispatcher at Sidney; and Amelia Pauley, M I's human resources representative at Sidney. In the formation of a joint management-employee committee for recommendations on cost cutting, M T's Rathbun and M I's Abel chose John Walden, the Sidney M T dispatcher to work in conjunction with Amelia Pauley, M I's human resources' representative among the 300 M I employees at Sidney, Ohio. In short, such disregard of corporate integrity in executing labor relations hardly supports a conclusion that the two corporations enjoyed an "arms'-length" relationship. *NLRB v. Browning-Ferris Industries*, supra; *Blumenfeld Theaters Circuit*, supra. To the extent Rathbun testified that M T uses M I Vice President Sears' expertise in labor relations on a consulting basis for which services M I charges M T, such testimony was never supported by any evidence showing any such financial charges. I do not credit such testimony and find that

such testimony again reflects unfavorably on Rathbun's credibility.

I conclude, on the basis of the above evidence, that, with regard to labor relations, there was centralized control of the labor relations of the two corporations and, on this record, a disregard of M T's corporate independence.

With regard to the fourth element for determining single-integrated employer status, *interrelation of operations*, there is no dispute that no less than 75 percent, and perhaps as high as 90 percent, of Masland Industries' product is carried by Masland Transportation trucks and Masland Transportation drivers (compare: Tr. 23, 78–79, with Tr. 569). Of this total, it is immaterial that Masland Industries pays for 35 percent of the cartage business and that Ford Motor Company, M I's largest customer, pays for 40 percent (Tr. 22–23). The record shows that because of peculiarities of Ford's "delivery on time" production system, it is necessary and convenient for Masland Industries and Ford Motor Company to utilize Masland Transportation trucks and drivers to perform the delicate service of on-time delivery of Masland Industries product. Ford Motor Company pays Masland Trucking for delivery of goods to its plants manufactured by Masland Industries. Again, Masland Trucking transports 75 to 90 percent of the goods produced at the three Masland Industries plants.

In addition, with regard to interrelation to operations, I have already concluded that there is a substantial disregard of the separate corporate existence of Masland Transportation and Masland Industries. As noted in the centralized control of labor relations, M I's Sidney, Ohio plant manager, Rich Abel, jointly with M T Vice President Rathbun, chose the M T drivers who would deal with M T management in order to negotiate a reduction of labor cost at the Sidney, Ohio plant among the M T driver-employees. They also chose the negotiators for M T: John Walden, the M T dispatcher of the Sidney drivers; and Amelia Pauley, the M I human resources representative performing, indiscriminately, personnel services for 300 M I production and maintenance employees at the Sidney plant and M T's 16 drivers at the Sidney plant.

To the extent that Vice President Sears, Plant Manager Abel and Pauley, employees only of M I, were important, sometimes dispositive, players in M T's labor relations, the discharges of all 16 M T Sidney drivers, and other corporate matters, M I was a "direct participant" in the unfair labor practices herein, *Esmark Inc. v. NLRB*, 887 F.2d 739 (7th Cir. 1989) (large-scale disregard of the separate existence of a subsidiary corporation leads to inference of single-employer status). For instance, unlike other shippers, M I was not charged for its delays in loading its products, which cost was absorbed by M T (Tr. 84). After the formation of M T in August 1991, the erstwhile M I drivers, now employed by M T, continued to receive the same rate of pay as they received as employees for M I, and were not required to fill out M T employment applications; there were no changes in benefits (Tr. 92); their seniority was measured by inclusion of service with all prior Masland entities. Moreover, after the formation of M T, the erstwhile M I drivers at Sidney, now employed by M T, continued to wear their M I uniforms, carrying the name "Masland Industries" (Tr. 122); the M T drivers used the drivers' logbooks issued by Masland Industries (Tr. 125; G.C. Exh. 4); the M T drivers continued to use identification cards bearing only the name Masland In-

dustries, rather than Masland Transportation (G.C. Exh. 5; Tr. 127); and, contrary to industry practice upon changing employers, the Sidney drivers, upon becoming M T employees, continued to operate under the 2-year medical certification issued by Masland Industries (Tr. 128 et. seq). Lastly, Masland Transportation has no business stationery (Tr. 710). In response to this prima facie showing of *interrelation of operations* to the point of M I disregarding the corporate integrity and independence of M T, and directly intervening in the unfair labor practices, neither M I nor M T sought to show, for instance, that M T paid rent to M I for the space it occupied at the several M I manufacturing plants, including the plant at Sidney, Ohio. Nor did it seek to show that the benefit plans administered solely by M I employee Amelia Pauley ever distinguished between M T drivers and M I production and maintenance employees at the Sidney, Ohio plant.

M I Plant Manager Abel testified repeatedly that his labor relations function in dealing with the M T drivers was purely as a "consultant." He repeated this word "consultant" so many times in the hearing that it was evident that the repetition was for my benefit. His testimony was that he appeared as a "consultant" at the request of the Sidney, Ohio M T drivers. There was no proof, however, which drivers, if any, appointed or requested him as a "consultant." Abel revealed no names. And, assuming, arguendo, that he was a "consultant," for whom was he "a consultant?" Was he the drivers' consultant, M T's consultant or M I's consultant. In fact, however, I find that he was acting as the joint labor relations designee of both M I and M T, an agent representing only the interests of M T and M I.

I conclude, therefore, on the basis of the common management of the two corporations, the common ownership of the wholly owned subsidiary M T, the domination of all labor relations policies of M T by M I, the interrelation of operations of M T and M I, and, as will be seen, the direct participation of M I in the unfair labor practices herein, that the two corporations constitute, as alleged, a "single employer" within the meaning of the Act. *Radio Broadcast Technicians Local 1264 v. Broadcast Service of Mobile*, 380 U.S. 255, 256 (1965); *NLRB v. Emsing's Supermarket*, 872 F.2d 1279 1288–1289 (7th Cir. 1989); *Esmark Inc. v. NLRB*, 887 F.2d 739 (7th Cir. 1989); *Douglas and Shanks, Insulation from Liability through Subsidiary Corporations*, 39 Yale L. J. 193, 196–197 (1929).

## II. THE UNION AS STATUTORY LABOR ORGANIZATION

The complaint alleges, Respondents admit, and I find that at all material times Teamsters Local Union No. 908, affiliated with International Brotherhood of Teamsters, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

## III. THE ALLEGED UNFAIR LABOR PRACTICES

M I maintains three manufacturing facilities: Carlisle, Pennsylvania; Lewistown, Pennsylvania; and Sidney, Ohio. Corporate headquarters are at the Carlisle, Pennsylvania plant, where M I officers and M T Vice President Rathbun work, and are about 400 miles from the Sidney, Ohio plant. At each of these three manufacturing facilities, M T has a transportation terminal.

As previously noted, the Sidney manufacturing facility employs about 300 M I employees; there are, since August 1991 separate incorporation, 16 M T drivers at the Sidney plant. The Lewistown plant has 9 drivers, Carlisle has 21 drivers, and the Canadian terminal has 1 driver. All drivers are employed by M T. The plant employees and drivers at the Lewistown and Carlisle, Pennsylvania plants are represented in collective bargaining by the Amalgamated Clothing & Textile Workers Union (Tr. 45-46; G.C. Exh. 3). None of the 300 Sidney, Ohio M I plant employees or the 16 M T drivers were represented by a labor organization prior to the organizational campaign hereinafter described.

Because M T's overall operation had been apparently showing substantial operational losses, John Rathbun, newly vice president of M T, by September 1991 undertook a detailed analysis of M T Trucking operations to determine the cause of the losses. He discovered that, for the year ending August 1991, M T lost \$202,155. A breakdown of driver cost per mile at each of the terminals showed that the cost of labor for drivers at the Sidney operation was running 9 cents per mile higher than that of the Carlisle operation. On September 26, 1991, Rathbun met with and discussed the results of this investigation with his immediate superior, Richard Krout, vice president of both M I and M T. Krout directed Rathbun to "fix" the situation because M T could not be permitted to continue to operate at a loss. Rathbun and Krout had been previously aware of losses by the entire fleet but had not taken action to remedy this situation. Sidney driver Warren A. Freels and other Sidney drivers credibly testified that they had been employed at the Sidney terminal since 1988, and that in every year of employment, the employer complained that it was losing money on the transportation operation (Tr. 135).

As a result of this September 26, 1991 meeting, Rathbun directed further studies of the M T operation to discover possible solutions. On October 28, 1991, Rathbun traveled from his Carlisle headquarters to Sidney to discuss Sidney's non-competitive labor cost situation with M T's Sidney dispatcher, John Walden, and with M I's Sidney plant manager, Rich Abel. At subsequent meetings, Rathbun discussed various options for lowering the Sidney driver operating costs with officers of both M I and M T: Richard Sears (vice president, M I); Amelia Pauley (M I human resources representative at the Sidney plant); Rich Abel (M I Sidney plant manager); and Jeff Benjamin (M I plant employee relations manager, Carlisle plant). Among the options discussed was switching the method of paying the Sidney drivers from their hourly pay rate to a pay rate based upon mileage driven. The hourly pay rate of Sidney's drivers was unique in the industry. All other carriers paid their drivers on a mileage basis (Tr. 625-626).

In meetings in late 1991, the subject of M T getting out of the trucking business entirely was raised but was opposed by M I Plant Manager Rich Abel. Abel was concerned with possible interruption of M T's high quality trucking service for M I necessary to meet the Ford Motor Company's demands for specialized delivery service (Tr. 626-627). In a Carlisle meeting attended by Rathbun, Pauley, Sears, Benjamin, and Abel in December 1991, M I Plant Manager Abel, consistent with his desire to retain M T as M I's carrier, suggested, and it was agreed, that Rathbun bring the Sidney drivers into the discussions and get their input on

cost-cutting methods. At the same time, however, Rathbun explored other means of transportation in order to satisfy and remedy M T's continuing losses. These included his contacting other common carriers, "dedicated carriers," and driver-leasing companies.

By early January 1992, Rathbun, consistent with exploring other modes of satisfying M T's transportation problems, solicited a written proposal of costs from a driver leasing company, Drivers Inc., a subsidiary of Vanguard Services, Inc. In January, Rathbun, Krout, and Sears, had already decided that the use of an outside common carrier or even a "dedicated contract carrier" was not desirable because of the remaining obligations flowing from Respondents' long-term leases held on the many tractors and trailers used by M T. Furthermore, the use of dedicated or common carriers would not correct the financial "hemorrhaging" quickly enough (Tr. 646). They decided, therefore, to pursue the leased-driver Drivers Inc. route and to look further into a proposal which had been received from Drivers Inc. on or about January 10, 1992. As Rathbun testified, Respondents' decision in January 1992 was that M T concurrently pursue two paths: the leasing of drivers, thereby getting M T out of the employment of drivers altogether; and also to continue to employ the drivers but get the Sidney drivers involved and to try to fix the problem internally (Tr. 647). The continued use of M T drivers would have the advantage of M T keeping its own trucks, avoiding the problem of disposing of Respondents' long-term leases and would also avoid problems of supervision, payroll and the distribution of benefits to M T employees (Tr. 626 et. seq.).

As a result of Rathbun's meetings with Krout and Sears in Carlisle (Abel and Walden did not attend the Carlisle meetings), Abel and Walden were notified by Rathbun that there would be a meeting with the Sidney drivers relating to M T's operational losses and particularly the roll of labor costs of the Sidney drivers in that operational loss (R. Exh. 12).

#### The February 1992 Meetings with the Sidney Drivers

Present at the February 8, 1992 meeting of management and the Sidney drivers, held in the Sidney plant, were M I Plant Manager Abel, M I Vice President Sears, M I Employee Relation Representative Pauley, M T Vice President Rathbun, and M T Supervisor (dispatcher) Walden. Also present were all 16 Sidney M T drivers (15 over-the-road drivers and 1 "jockey" driver (Tr. 495-496)).

Abel started the meeting by telling the employees that business was bad but was showing signs of improvement. Rathbun then took over and, with the aid of overhead slide projections, discussed business trends, business to be acquired, saving money by cutting administrative positions, the leasing of new and larger trailers and particularly the unprofitability of the transportation operation. He demonstrated (R. Exh. 1) that wages constituted the largest single component in cost-per-mile operation of the fleet as opposed to the costs of fuel, truck rentals, etc. Rathbun warned the employees that the Ford Motor Company, Respondents' biggest customer, was reducing the number of carriers from 700 to 100 in a new bidding process; excessive Sidney labor costs, causing a \$200,000 deficit, would not have occurred had Respondent been paying the 29-cent-per-mile regional average wages to its drivers. Rathbun told the drivers that M

T must not only be service competitive—which it was—but that it must become cost competitive in order to retain the Ford business. While stating that the Sidney labor costs were out of line, he told the employees, in answer to their questions, that M T could still retain the Ford business by the use of specialized double-deck trailers and because of M T's excellent reputation in delivering goods to Ford on a timely basis (Tr. 657).

Rathbun then returned the meeting to Plant Manager Abel who told the employees that the Respondents' "game plan" was to form a driver committee to solicit driver input on how to fix the problem. Abel asked the drivers for volunteers. The evidence is in dispute whether there were any volunteers. There is no dispute that Abel and Rathbun later picked three drivers to represent the drivers on the committee: Jack Meinberg, Donnie Freels, and Scott Egbert. Rathbun and Abel also chose two employer representatives to join with the three drivers on the committee: M T Dispatcher John Walden and M I Human Relations Representative Amelia Pauley.<sup>3</sup>

At a committee meeting on February 14, the three drivers met with Walden and Pauley to discuss cost-cutting measures. These included unnecessary delay time, insufficient charges for certain runs, backhaul rates, and the need for improved fuel efficient equipment (Tr. 267–268). Although the drivers made recommendations to Walden and Pauley, there were no agreements reached (Tr. 293–294).

Pauley was unable to attend the committee meeting on February 21, 1992, and M I Plant Manager Rich Abel took her place. He testified that he appeared merely as a "consultant" but I conclude that he was representing the labor relations and business interests of both M I and M T. Walden was also present.

Driver Meinberg recalled that Abel, not present at the first meeting, was brought up to date. I regard Abel's testimony as to what occurred at the February 21 meeting to be unreliable although his testimony, in part, corroborates that of the General Counsel's witnesses. To the extent that he denies certain statements by the General Counsel's witnesses, I do not credit his denials. To the extent that he testified, with respect to certain alleged antiunion statements recounted in the testimony of driver Donnie Freels, that he could not recall making such statements, I do not credit his alleged lack of recollection.

Rather, I credit the testimony of drivers Meinberg and Donnie Freels that at the February 21 meeting, they discussed, as they had at the February 14 meeting, cost-cutting. Donnie Freels testified that Abel and Walden were not willing to discuss dispatch procedures, the backhaul of freight, or the use of different equipment but wanted to discuss wage reductions. Meinberg testified that Donnie Freels finally asked Abel what was on (management's "mind" and where was management going (Tr. 269; Tr. 297). Freels asked Abel to "be up front with us about where this was all leading" (Tr. 297). Dispatcher Walden recalled that the drivers asked whether they would be put on a mileage pay rate (Tr. 822). Abel told the three drivers that M T needed to go to a mileage system to bring labor costs in line with other of Re-

spondents' facilities (Tr. 270; 280; 297). Meinberg then asked Abel if M T was going to treat the Sidney drivers the same as it was treating Respondents' drivers at Carlisle and Lewistown (where, under a union contract, the drivers are paid on a mileage basis rather than an hourly basis) and Abel responded that the Sidney drivers would end up with pretty much the same as at Carlisle and Lewistown (Tr. 270; 281–282). Meinberg reminded Abel that at the unionized Carlisle and Lewistown plants, the drivers are assigned trucks, 1 driver to each truck, and at Sidney, there were only 11 trucks for 15 drivers doing over-the-road work. He asked Abel whether M T was planning to get additional equipment to give each Sidney driver a truck (Tr. 270–271). Abel did not answer that question (Tr. 271). Meinberg then asked Abel, since Lewistown and Carlisle were both unionized, how did M T expect to "handle that?" (Tr. 271.)

Donnie Freels recalled that Meinberg's mention of the Union came up when Abel said that M T needed to go to a mileage system to bring the Sidney operation in line with the M T costs at the Carlisle and Lewistown facilities. He credibly testified that Meinberg said that if they were going to be paid like Carlisle, perhaps the Sidney drivers should be like Carlisle "totally" (Tr. 297). When Abel asked him what he meant by that, Meinberg said that "maybe we should be union like Carlisle." I do not credit Abel's denial of this Meinberg statement notwithstanding that Abel admitted that there was a comment like that in a later discussion he had with the drivers (Tr. 577). No such later discussion was ever particularized. I regard Abel's testimony as amorphous, vague, and not credible (Tr. 580). His testimony, that it occurred in April, after the Teamsters organizational activity became widely known, is rejected.

Both Meinberg and Donnie Freels further credibly testified that Abel answered Meinberg by stating (Tr. 275; 283):

[If] we went in that [union] direction, it was his opinion that Masland would overbid the contract with Ford so that [Masland] did not get [the Ford business] and would dissolve the fleet . . . the trucking operation.

Meinberg's testimony on this point was unshaken on cross-examination (Tr. 283–285).

Donnie Freels' recollection was that Abel told Meinberg (Tr. 298–299): that if the Sidney drivers "were to organize or to attempt to organize, . . . it was his considered opinion . . . that Masland would up the bid to Ford and they would eliminate the fleet . . . by doing that." Donnie Freels then asked Abel what he meant by that and Abel said (Tr. 299):

Masland felt that there was no need to be organized and that, in this opinion, any attempt for us to be organized would result in Masland upping the bid to Ford Motor Company which would ultimately eliminate the fleet.

In further examination, Freels testified that Abel said that the response by M T would be to raise the bid to the Ford Motor Company to eliminate the fleet "if that was what it took . . . to stop the union movement . . . eliminate the fleet, eliminates the Union problem. And that was basically what he said" (Tr. 345). I regard this later Freels' testimony as recapitulation rather than what Abel actually said.

I have already noted my dissatisfaction with Abel's repeated description of himself as a "consultant" using that

<sup>3</sup>Respondent apparently concedes that Amelia Pauley, an employee of M I, and having no overt relationship to M T, was nevertheless, along with Walden, a representative of M T (R. Br. 4).

word as some secret verbal amulet or magic word which would either avoid an inference of his agency representing M T (or M I, or both) or his avoidance of unfair labor practices, in general. His testimony on the Meinberg-Freels conversation of February 21 gave no support to his general credibility. Abel admitted that the Sidney plant is the only nonunion facility of the Masland Industries plants (Tr. 579), that he was opposed to the unionization of Sidney's transportation operations (Tr. 578); that he attended at least four training sessions in methods of discouraging union activity among employees (Tr. 578-579), the last as recently as October 1991 (Tr. 579); and that he had been successful in warding off at least one or two union organizing campaigns at the Sidney plant (Tr. 579).

Although I would resolve this credibility issue against Abel both on the quality of his testimony and my observation of his demeanor as he testified, it is actually unnecessary to resolve the credibility issue on these grounds. Another element favoring the credibility of the General Counsel's witnesses over Abel's variable denials, is the presence at the February 21 meeting of Employer Representative John Walden.

Walden testified that Abel attended the February 21 meeting because Amelia Pauley could not make it (Tr. 823). When, on direct examination, he was asked whether any of the drivers at the February 21 meeting asked whether M T was going to go to the Carlisle pay system, his testimony was evasive and ended in a lack of recollection whether a reference to the Carlisle system was made at that meeting (Tr. 824). He then was specifically asked whether Abel, in response to a question from a driver, said that if Sidney drivers went to a union, the fleet would be eliminated. His answer was: "I don't recall that being said at that meeting"; that he did not "have [a] recollection presently that it was raised" (Tr. 825). It is clear that the detailed, impressive and mutually corroborative testimony of Meinberg and Donnie Freels must be credited over Abel's denials and Walden's lack of recollection. I observed and the record shows that Walden's testimony was evasive and discursive (Tr. 824-825), marked by repetitious alleged lack of recollection. A lack of recollection is a fact just as is any other fact. I do not credit Walden's testimony insofar as he testified that he had no recollection whether the employees at the February 21 meeting said that if they were going to be paid like the Carlisle employees, they should go to the Carlisle system; and his lack of recollection whether Abel said that if the Sidney drivers became unionized, the fleet would be eliminated (Tr. 824-826).

Complaint paragraph 6(b)(i) alleges that on February 21, 1992, Respondents, by Richard Abel, at the Sidney facility, threatened employees with cessation of fleet operations if they attempted to have a union become their bargaining representative. On the basis of the above-credited testimony and discussion, I conclude that, as alleged, Abel unlawfully threatened Meinberg and Donnie Freels with the cessation of fleet operations if the Sidney drivers attempted to become unionized. Such a threat violates Section 8(a)(1) of the Act and I so find.

On or after January 10, 1992, Rathbun received an initial written presentation from Drivers Inc. as to the cost and terms of a driver-leasing arrangement. Rathbun, having attended the February 8 committee meeting with the drivers,

and having discussed the matter with Krout and Sears, nevertheless continued along the two avenues to solve M T's financial problems: to see if they could be solved internally through meetings with the drivers and also to explore the possibility of using a leased-driver operation. Consistent with this second path, Rathbun, on February 17, 1992, met with Driver's Inc. representative Ron Robinson and Vanguard Services official, Ben Lagarde. Rathbun asked them to resubmit a more formal and detailed proposal than Drivers Inc. had submitted to M T in January 1992 (R. Exh. 9) and Drivers Inc. did so. The revised March 6 Drivers Inc. proposal (R. Exh. 14) was received by Rathbun in or around March 8 or 9th (Tr. 666). Thereafter, having received the early March proposal, Rathbun contacted Robinson and wanted a further "cleaned-up proposal" (Tr. 674) bearing the proper name of the lessee (M T) and the proper situs of the operation (Sidney, Ohio rather than Dayton, Ohio) (Tr. 674). About a week later he received the cleaned-up version (Tr. 675).

March 9; Donnie Freels, John Walden and Rich Abel  
in the Sidney Dispatch Office

On or about March 9, Donnie Freels spoke with Plant Manager Abel in the Sidney dispatch office in the presence of Dispatcher John Walden (Tr. 300-301). At the committee meeting of February 21, it will be recalled, drivers Meinberg and Freels sat across the table from Abel and Walden and heard Abel threaten that if the Sidney drivers were to organize or attempt to organize, his "opinion" was that Masland would, by upping the bid to Ford, price itself out of the market and eliminate the fleet to defeat the union; and that Respondents felt that there was no need for the drivers to be organized (Tr. 298-299, 345, 275, and 283). Two and a half weeks later, on March 9, in the Sidney dispatch office, Plant Manager Abel asked Freels "how the drivers felt about a union involvement" (Tr. 301). Freels told him that he was not aware how the drivers felt about union involvement. Abel answered that he ". . . felt that there was no future in [us] being organized at Sidney; that Masland took a very dim view of unions and he felt that there was no purpose in us being organized there and that we did not need a union to give away our rights—or take away our rights from us" (Tr. 301-302).

While Abel admits having discussed the Union with Freels in March (Tr. 521), he denies asking him how the drivers felt about the Union or "a union" (Tr. 523). He testified further that he had no recollection of whether he told Freels at that time that the Sidney drivers had "no future in being organized." I do not credit Abel's continued lack of recollection. He did testify that he told Freels that "we don't need a union in here, in my opinion and that . . . we could communicate better without a union" (Tr. 526-527). During his relationship with Freels, Abel testified that he told this to Freels at least three times (Tr. 527).

Dispatcher John Walden, who testified with regard to the February 8, 14, and 21, and April 11 meetings, was not called to testify on this point: either to corroborate or deny Freels' testimony and Abel's response. Since Walden was at the meeting, his failure to testify on the point leads to an inference adverse to Abel's version. *International Automated Machines*, 285 NLRB 1122 (1987). With or without such an adverse inference, I credit Freels' testimony over Abel's denial of recollection.

The complaint, paragraph 6(b)(ii), alleges that Abel, on March 9, 1992, unlawfully interrogated an employee about his and other employees' union sympathies.

#### Discussion

On February 21, 1992, in a committee meeting, Abel unlawfully threatened Meinberg and Donnie Freels with discontinuance of the Sidney operations. Freels had not shown himself to be a supporter of unions. In view of this prior unlawful threat, Abel's March 9 interrogation of one of the objects of that threat and one of the participants in that conversation, Donnie Freels, must be viewed as coercive. The coercive nature of the inquiry is found in Abel not inquiring concerning merely Freels' own union sympathies; rather he asked him how the other drivers felt about "union involvement." An inquiry from a hostile chief supervisor to an employee, not identified as a union supporter, into the union sympathies of other employees violates Section 8(a)(1) of the Act. *Crown Cork & Seal Co.*, 308 NLRB 445 (1992); *Raytheon Co.*, 279 NLRB 245 (1986); *Springs Inc.*, 280 NLRB 284 fn. 2 (1986). A question from a hostile top supervisor designed to have an employee divulge the extent of the union activities or union sympathies of coemployees is precisely the type of information which employees, under the Act, are privileged and permitted to keep to themselves, *NLRB v. Laredo Coca-Cola Bottling Co.*, 613 F.2d 1338 (5th Cir. 1980), cert. denied 449 U.S. 889 (1980). I find that Abel's March 9 interrogation of Freels violated Section 8(a)(1) as alleged.

#### Respondents' March 17 Meeting

With regard to the results of the February 21 committee meeting, Rathbun took no action until almost a month later. On or about March 17, Rathbun met with Walden and Krout on the driver committee recommendations, compiled by Abel, concerning mileage pay versus hourly pay, effective delay time and other committee recommendations (R. Exh. 16). After discussing the matter, Rathbun, Krout, and Sears told Walden that they would get back to him. They did not make any response to the findings of the committee. Sears, Krout, and Rathbun concluded that the committee proposals were not acceptable because they did not go far enough: the pay differential in Sidney remained too large; the Sidney wage cost was still greater than other wages in the fleet operation (Tr. 685).

While Rathbun merely notes that as a result of this meeting with Sears and Krout, a further meeting for April 11 was scheduled, Sears and Krout testified with particularity about this March 17 meeting. Sears testified (Tr. 759) that after Walden had presented the task force recommendations and left, Krout and Sears remarked that it was not enough and, together with Vice President Owen, they held a further meeting that day to review the committee proposal (Tr. 759). Rathbun was not present. Sears testified that both Krout and Owen wanted to "stop the bleeding as soon as possible . . . to stop the fleet immediately" (Tr. 767). Sears opposed them and said that he wanted to continue the Sidney operation and pay the Sidney drivers the Carlisle wages plus a slight addition. Krout and Owen responded that they did not believe that it would work; that the handwriting was on the wall and that the Sidney drivers would not accept the change to a

mileage rate. When Sears insisted that they permit the drivers the opportunity to accept the change, Krout and Owens agreed to try it (Tr. 768). Owens did not testify.

M I Vice President Sears testified that as a result of the March 17 discussion between himself, Owen and Krout, they decided that it was necessary to have a further meeting with the Sidney drivers at which the employer would spell out, in detail, the new mileage pay scale. He testified that he thereafter met twice with Walden, Abel, and Pauley, and planned the presentation for a subsequent meeting, the meeting of April 11, 1992.

Finally, Sears testified that at the March 17 meeting with Rathbun, Owen, Krout, and himself, they decided to get out of the transportation business at Sidney unless there was "a resounding acceptance from the drivers" at the April 11 meeting of the imposition of a mileage pay rate system. I do not credit this testimony and conclude that Sears was attempting thereby to bolster and rationalize subsequent actions of Respondent. These subsequent actions would include the conclusion that Respondent, commencing as early as March 17, decided to terminate the Sidney drivers and to lease out the Sidney M T operation to Drivers Inc. On the contrary, as will be seen, I find that Respondents decided to impose a mileage pay rate system at the April 11 meeting to become effective July 1 and to keep the Drivers Inc. option only if the Sidney drivers rejected the proposed mileage pay plan.

Krout testified (Tr. 791-792) that, at the March 17 meeting, he had made the decision to terminate the Sidney, Ohio drivers because he had heard that the drivers would be unable to accept the changes necessary to make the enterprise profitable; that he made the decision to get out of the business of employing drivers and to lease drivers instead (Tr. 792). Krout emphasized that it was at this March 17 meeting, devoted exclusively to the problem of the disposition of the Sidney drivers, that the decision was made, on consultation with Vice President Owen (operations) and Sears (human relations), to proceed with the option to lease drivers from Drivers Inc. and to return the fleet to profitability (Tr. 794). I have concluded that, at the March 17 meeting, Respondent's vice presidents decided to have a further driver meeting. I reject and do not credit Krout's testimony that any definite decision to terminate the drivers was made; rather, I find that they decided to keep the M T drivers unless they rejected Respondents' offer. The group decided to meet with the drivers one more time with a plan to move to a mileage system which was roughly equivalent to that of other sections of the fleet (Tr. 795). It is noteworthy that this decision to impose the Carlisle mileage pay system at Sidney was allegedly made as early as March 17, 1992, with the knowledge that the trucking operations at Carlisle and Lewistown were either profitable or break-even operations (Tr. 812). Respondents' witnesses continually referred to the operating losses at Sidney as "hemorrhaging" or "bleeding." Sears allegedly contemporaneous notes, allegedly recorded at this March 17 meeting disclosed both the decision to have outside carriers haul the freight and to "stop the bleeding ASAP" (R. Exh. 19).<sup>4</sup>

<sup>4</sup>The March 17 meeting was devoted to a review of the recommendations of the drivers' committee (R. Exh. 16). The recommendations were that the losses at Sidney were due to the unique situation of the Sidney transportation environment and Respondent's

*Continued*

Subsequent to the March 17 meeting, Sears went to Sidney twice and met with Walden, Abel, and Amelia Pauley and mapped out exactly what the Respondents' position would be with regard to the Sidney drivers at this subsequent meeting to be held on April 11, 1992 (Tr. 770). Like Krout, Sears testified that M T was to get out of the transportation business unless there was an enthusiastic driver acceptance of the Company's proposal (Tr. 770). I have rejected such testimony as not credible. I have concluded, above, that Respondents—for reasons previously advanced by Abel decided to remain as the drivers' employer unless they rejected the April 11 offer. Krout, Owen, and Sears also decided that Rathbun would be the officer to "sell" their compensation package to the Sidney drivers at the April 11 meeting (Tr. 771–772).

#### Union Activity and Organization Among the Sidney Drivers; March 1992

I have found, above, Abel's unlawful threat of February 21 and unlawful interrogation of March 9.

Sometime in late March, driver Warren A. Freels (no relative of Donnie Freels) contacted Dave Clemmens, business agent for Local 908, International Brotherhood of Teamsters, the Charging Party herein. They arranged a meeting for March 26 which was attended only by Warren Freels and Clemmens. Two days later (Tr. 140), March 28, there was a second meeting, this time attended by Freels, driver Fred Poppleman, Clemmens and Clemmen's associate, Business Agent Matthews, of Local 908. Poppleman and Freels signed union cards at that time and already knew that Respondents had scheduled the April 11 driver meeting. They decided to await the results of the April 11 meeting before telling other drivers of their contact with the Union (Tr. 142). In the week prior to the driver meetings with the Union, as above noted, Abel had memorialized (R. Exh. 16) the results of the February 21 committee meeting including the proposed implementation of the mileage rate. Again, as above noted, Abel's recommendations were presented by Walden to Rathbun, Sears, and Krout in Carlisle on March 17. It was at that meeting, that Respondents, on Vice President Sears' insistence, agreed to give the Sidney drivers a further chance to accept Respondents' mileage rate and other terms and conditions of employment at the meeting of April 11, 1992.

#### The April 11, 1992 Meeting with the Sidney Drivers

At the meeting of April 11 (Tr. 685), Rathbun (in the presence of Abel and Walden) presented Respondents' response

inefficient financial management. In particular, the committee decided that the Sidney operation could not compete with common carriers because of various advantages that common carriers have over the Sidney operation; and that common carriers would cause more expense to the operation.

The committee recommended changes in the gainsharing plan (a saving of \$36,000 per year); a proposal to switch to a mileage pay system at 32-1/2 cents per mile, 2 cents per mile higher than Carlisle/Lewistown with \$7.50-per-hour pay for delay time (a \$16,000-a-year savings) and various administrative savings (\$19,600 per year). Lastly, the Sidney Transportation recommendation included improvement in backhaul revenue at a potential saving of \$25,000 per year. This total proposed savings would be about \$96,000 per year. The M T operational losses were running at about \$200,000 per year.

to the committee's proposal (R. Exh. 16). Rathbun proposed that the Sidney drivers be put on a mileage pay rate basis mirroring the wage package in Carlisle and Lewistown, to become effective July 1 at Sidney (Tr. 786). That rate, 30-1/2 cents per mile and \$7.25 per hour for delay time (Tr. 786), would be the same as the Carlisle unionized mileage rate which, under the collective-bargaining agreement, would rise to that level on July 1 (Tr. 686–687).

Abel and Rathbun also discussed eliminating unnecessary taxes, increased efforts to get more backhaul revenue and eliminate excessive delays in loading and dispatching (Tr. 529–531). Abel drew on the blackboard a comparison of hourly pay and mileage pay. He showed that the drivers would not significantly lose pay on the mileage pay rate system which, he said, encouraged drivers to spend time on the road and discouraged delay time.<sup>5</sup>

At the meeting, the drivers reminded Rathbun and Abel that there were 16 drivers and only 11 tractors, and that the drivers were concerned that the 16 drivers would not drive enough miles with only 11 tractors to make a full pay check (Tr. 146). They testified that it would take them a lot more driving miles to make the same paycheck they made on an hourly rate if they switched to a mileage rate. Abel told them, in substance, that there might not be enough work for some of the drivers. Driver Scott Egbert then asked Abel what would happen to the five drivers without assigned tractors and, particularly, whether they would get "bumping rights" back into the plant as plant employees if there was not enough work for them as drivers. All of the General Counsel's witnesses testified credibly that Rich Abel answered that they would be given their seniority rights to "bump [into] any job [they] could do in the plant" (Tr. 150). Abel then looked around at Rathbun seeking confirmation. The General Counsel's witnesses all testified that Rathbun, sitting behind Abel, shook his head "yes," to affirm Abel's statement.

With regard to Egbert's question concerning the right of drivers to "bump" back into plant jobs, Abel testified that he could not recall his exact words but that his response was that he did not know; and that it was something that he would have to check out (Tr. 538). Particularly, he testified that Rathbun and Walden made no responses to the "question" of bumping (Tr. 538–539). In view of my observation of the demeanor of the witnesses, and particularly the clarity, corroboration, and directness of the General Counsel's witnesses, together with the pertinence and timing of the questions posed by the General Counsel's witnesses to Abel, I credit neither this further demonstration of Abel's inability to recall his exact words nor his additional response that he did not know whether there were such "bumping" rights.

<sup>5</sup>While Abel was putting the mileage rate figures on the board, telling the drivers that they would not lose any significant income (i.e., average losses of about \$1000 per year) from the change in pay rates, driver Warren A. Freels, on the preceding day, April 10, had already had a conversation with Dispatcher Walden. Warren Freels testified, and Walden did not deny, that, on April 10, Walden and Freels figured out what Freels would earn under the new mileage pay rate system, based on the miles he had driven in the preceding year. Walden told Freels that he would lose \$3000 per year based upon the mileage that Freels had driven the previous year (Tr. 253–254).

Rathbun testified that with regard to Egbert's question to Abel concerning bumping rights, he recalled that Abel told Egbert that he would take a look at it if it happened; that they were at the meeting to discuss ways of making the fleet viable and that he had every reason to believe that that was going to come out that way (Tr. 712). I specifically discredit Rathbun's testimony concerning bumping rights for the same reasons that I discredited Abel's.

Donnie Freels convincingly testified that Egbert's question concerning plant bumping rights followed upon the drivers' observation that there were only 11 tractors for 16 drivers and Rathbun's or Abel's response that the Respondents would have to look at lowering the number of drivers to match the number of trucks (Tr. 306-307). It was then that Egbert raised the question on bumping. Freels recalled that it was at this point that Abel said that the Sidney drivers had the same rights that they always had at Masland and, if their jobs were eliminated, their seniority rights would carry into the plant at a job they could suitably do (Tr. 306-307).

During a break in the April 11 meeting, Donnie Freels spoke with Abel in the conference room. Abel asked him if he thought that the drivers were going to support a union (Tr. 309-310). Freels again repeated, as he did on March 9, that he did not know if the drivers would or would not support a union. Abel told him that there was no future in the employees being organized. This latter statement, from a hostile supervisor, of "no future" in employees being organized is, per se, a declaration of the futility of union representation and violates Section 8(a)(1) of the Act. Compare *Montgomery Ward & Co.*, 222 NLRB 965 (1976), with *Liquitane Corp.*, 298 NLRB 292, 297 (1990).

I have already found that Abel's similar question on March 9 to Donnie Freels was unlawful, coercive interrogation having followed a February 21 threat of the employer going out of the trucking business if the employees sought to organize. What I now find, however, is that this April 11 repetition of the March 9 Abel inquiry into driver sympathies was Respondents' continued unlawful interest in the possibility of driver support for a union. I have considered and rejected the speculation that this Freels' testimony was merely a repetition of his March 9 testimony.

Sometime in the middle of the meeting, when Abel urged that a mileage pay rate, as opposed to the hourly pay rate, would encourage greater productivity through greater driver motivation, driver Poppleman loudly answered that the drivers met demanding time targets and were productive. He banged his fist on the table and/or kicked his chair in anger over Abel's remarks. Rathbun called for the drivers to settle down. The meeting continued.

No driver said he would insist on remaining at the hourly pay rate; no driver threatened to quit if the mileage rate was imposed. Abel testified, however, that other drivers made statements against the mileage pay system. He named no driver. I do not credit his testimony. No driver was given the alternative of accepting Respondents' terms or quitting.

#### Further Union Activity After the April 11 Meeting

On Monday, April 13, 2 days after the April 11 meeting (Tr. 228), driver Warren Freels telephoned Business Agent Clemmens and told him that he wanted to have a further meeting to present the Union to the drivers (Tr. 227). Clemmens said that he would mail letters to the drivers so

that they could have a meeting with the Union (Tr. 229). Drivers had told Freels that they wanted established work rules (Tr. 229), were concerned over the diversion of their work to Carlisle drivers, and wanted the stability of having a written contract (Tr. 239).

The Union sent letters to the Sidney drivers on April 18, 1992, informing them of a union meeting to be held in Sidney on Saturday, April 25 (G.C. Exh. 12). As early as Tuesday, April 21, however, Walden telephoned Rathbun (and personally told Abel) that the drivers were going to have a union meeting on April 25 (Tr. 581; 720).

#### The Response to the Drivers' Union Activity

Abel testified that, starting on the next day (April 22), he talked to about half the drivers about the approaching union meeting (Tr. 580). Rathbun started on the following day. Rathbun and Abel spoke with the drivers concerning the approaching union meeting, the drivers' attitudes towards the Union and management's position.

Thus, on April 23, the Carlisle dispatcher (Scott Decker) told Sidney driver Ernest Vestal (working at Carlisle) that Rathbun wanted to see him. When Vestal hesitated to comply, and said that he had finished work and he was "out of [driving] hours," the dispatcher told him: "I think you'd better come over and see him." Vestal had never before been in Rathbun's office. Rathbun invited him into the office and Vestal immediately asked Rathbun "is this about the meeting . . . with the Union on Saturday?" Rathbun answered: "yes, but I can't comment on that." Rather, Rathbun asked Vestal how he felt about the April 11 driver meeting. When Vestal said he had been confused, Rathbun agreed and said that it had not been informative (Tr. 358). He did not suggest that the drivers had rejected Respondents' proposal. Rathbun then showed him, and they discussed, the drivers' Operation Procedures at Carlisle and Vestal said that the procedures were "pretty good" (Tr. 360). Rathbun then told him that the Sidney drivers would "be getting these benefits. I'm surprised you guys haven't received this before" (Tr. 360). Vestal answered:

If you'd had this [Carlisle Truck Operating Procedures] with you at the [April 11] meeting at Sidney . . . perhaps we wouldn't be meeting with the union on Saturday, because a lot of these things in here we didn't have. . . . We have another meeting the morning of the 25th with just the drivers, not the union. . . . Why don't you let me take this document . . . and show the drivers. And after they see this, perhaps we won't even have to worry about voting or signing cards or talking to the union.

Vestal testified that (1) it was a benefit to the drivers merely to have a written description of the operating rules; (2) it would prevent Respondents from imposing illegal driving on the drivers; and (3) he was not opposed to the mileage pay rate (Tr. 385-396).

Rathbun then told Vestal: "Well, that would be a good idea, why don't you do that." He then gave Vestal a copy of the Carlisle Truck Operating Procedures and also the collective-bargaining agreement covering the Carlisle drivers (Tr. 361).

Vestal told Rathbun: "I wish you had this at the April 11 meeting." Rathbun said "[yes], I wish I would have brought [them] . . . and maybe we wouldn't have this." Rathbun then told Vestal that he should tell the drivers that he was giving them his "word" that they would get these benefits (Tr. 362). Vestal answered that that was "great" and that once the drivers hear that they had Rathbun's "word" that they would get the same benefits as the drivers received at Carlisle, ". . . that we might not even have to meet the union" (Tr. 362).

Such a promise of benefits by Rathbun, whether or not explicitly coupled with the reciprocal, that the drivers not sign cards, is an unlawful promise of benefits violating Section 8(a)(1) of the Act as alleged in paragraph 6(a) of the complaint.

On the same day (April 23) that Vestal met with Rathbun in Carlisle, Plant Manager Abel came out on the Sidney loading dock where driver Alfred Grillot was backing his trailer and asked Grillot to come into his office. Grillot entered the office, Abel closed the door and suggested that Grillot sit. After Abel apologized for having called Grillot into the office after Grillot had driven all night, Grillot asked Abel what he wanted. Abel told him that he understood "that you drivers are going to have a union meeting." Grillot told him that it didn't hurt to listen and Abel answered that it probably didn't hurt and added: "[But] if [you] were to sign union cards . . . [you] would be giving up [your] right to voice [your] opinion to management." Grillot protested that the Sidney operation had been mismanaged; that the drivers had been trying to tell management of this mismanagement for 2 years; and that management was seeking to use the drivers as a scapegoat. Abel responded (Tr. 434-435):

I'm just asking you not to sign the union cards because you'll be giving up your rights to voice your opinion to the Company . . . it could present a problem.

Grillot answered that he could not see how it would present a problem by merely listening to what the Union had to say and would not guarantee his signing or not signing a card. Abel thanked him for his time (Tr. 435).

Sometime between April 11 and 25, Donnie Freels, at Carlisle, spoke with Rathbun (Tr. 313-316). Freels asked Rathbun if Respondents "made a decision as to what . . . it was going to be as far as money . . . the money on the pay rate system at Sidney? Rathbun answered (Tr. 316): [No] they had not concretely come up with anything yet but . . . they [were] looking at [paying] 29 cents a mile, \$7.25 an hour . . . and there would have been a 2-cent domicile . . . bonus . . . because of our operating location." Rathbun then gave him a copy [G.C. Exh. 9] of the Carlisle Truck Operating Procedures and told him that as far as pay and operating procedures, with the exception of the 2-cent domicile bonus everything else would be the same as at Carlisle.

#### Union Action

It is undisputed that at the Saturday, April 25 union meeting, 13 Sidney drivers signed union membership application cards and gave them to Union Business Agent Clemmens.

On the following Monday, April 27, sometime after lunch, from Columbus, Ohio, Clemmens telephoned Abel in Sidney

to ask for recognition. He spoke to Abel's secretary (Tr. 459), identifying himself as an agent of the Teamsters Union. She told him that she knew what the call was about; that Abel was not going to talk to him; that he should call Rick Sears in Carlisle, Pennsylvania, and that Clemmens' questions could be answered (Tr. 439). Clemmens then telephoned Sears in Carlisle. He did not speak to Sears because Sears' secretary said that Sears was on the telephone. She directed Clemmens to call again in a half hour (Tr. 441). As in the case of the telephone call to Abel, Clemmens had identified himself, told her that he was with the Teamsters Union, and had been directed to call Sears to "answer some questions that I have" (Tr. 441). When Clemmens thereafter made the second call to Sears, Sears' secretary told Clemmens that she knew "what this is about," and that she did not "think Rick is going to talk with you; go ahead and do whatever you have to do" (Tr. 441-442). Clemmens thanked her and hung up.

After failing to speak with Sears, Clemmens telephoned his fellow business agent, Dan Mathews, and directed him to file a petition for an election with the National Labor Relations Board and to enclose the signed membership cards (Tr. 444; G.C. Exh. 2). The petition, filed by Local 908 in Case 9-RC-16037, shows that it was filed in the Regional office on the next day, April 28, 1992; that it contains an assertion that the request for recognition was made and refused on April 27, 1992; and that a copy of that petition was sent to Respondents (attention, Rich Abel, Sidney, Ohio) on April 29, 1992. A copy of the petition, sent by certified mail, was received by Respondent on May 1, 1992 (G.C. Exh. 2).

#### Respondent's Actions After the April 11 Employee Meeting

After the April 11 meeting, Rathbun returned to Carlisle on that Saturday. At the beginning of the following week, he met with Vice Presidents Sears and Krout to brief them on what happened at the drivers meeting. He testified he told them that that meeting had gone "poorly"; that there was "a lot of discontent" and that he was "very displeased with the lack of cooperation that was expressed at the meeting by the drivers" (Tr. 696). Rathbun testified that he drew the inference of extreme driver dissatisfaction with management's offer (30-1/2 cents an hour plus \$7.25 delay time) from driver Poppleman's pounding on the table and kicking a chair (Tr. 697). Although Rathbun admits that driver meetings are often rowdy, and although there were many questions asked by the drivers, there was no express physical action of the drivers other than Poppleman's banging his fist on the table and shouting at the management team. While it is unclear whether he banged his fist on the table or kicked the chair, or both, his loud statement related to Plant Manager Abel's assertion that the mileage pay rate system would motivate the drivers better than an hourly pay rate system. Poppleman complained, loudly, about Abel's implication that the drivers were not already "productive." Poppleman reminded Abel and Rathbun that the drivers came in the terminal in a state of fatigue, jockey trailers around, met almost impossible delivery deadlines at the Ford plants and then were being accused of not being productive (Tr. 692). None of the drivers at the April 11 meeting told Abel or Rathbun that they would insist on retaining the hourly pay rate or would refuse em-

ployment if the mileage pay rate system was implemented on July 1, as Rathbun and Abel stated.

In any event, on Monday, April 13, 1992, Rathbun met with Sears and Krout regarding the April 11 meeting. Later that day, outside the presence of Vice President Rathbun,<sup>6</sup> in an "impromptu" meeting in Sears' office, President Branch, Vice President Krout, Vice President Larry Owen, and Vice President Sears allegedly had a meeting in which they reviewed the transportation costs and the "[Sidney] drivers' ability to accept change." The drivers' recommendations and comments showed them that the April 11 proposals, modified by driver comments would not give Respondents enough money to continue using Sidney drivers (Tr. 716). They then allegedly agreed to terminate the Sidney drivers and to proceed with the "leased arrangement" (Tr. 773), the decision to terminate the drivers and to go with the "leased arrangement" allegedly based purely on economic considerations (Tr. 773). Although the record is unclear as to when this decision was made known to Rathbun (Tr. 773-774), it is clear that Rathbun knew about it prior to April 23 or 24 when he was telling driver Donnie Freels not to sign a union card and telling him that Respondents would stand behind the commitment to give the Sidney drivers the same working conditions that were given to the unionized drivers at Carlisle and Lewistown (Tr. 726).<sup>7</sup> In any event, Respondent asserts that Rathbun knew of the decision and that the decision was kept within a very small circle of Respondents' officers (R. Br. 6; Tr. 726; 773-774).

Rathbun testified, in substance, that on April 13, after he reported that the April 11 meeting had gone "poorly," he was directed to pursue the Drivers Inc. subcontracting proposal (Tr. 699-701). He stated that, on the same day, April 13, he then telephoned Ron Robinson of Drivers Inc. (Tr. 701) and asked him "how quickly he could put a transition program in place in Sidney, Ohio." Robinson allegedly told him it would take 2 weeks and directed Rathbun to contact the president of Drivers Inc.'s parent corporation, Jim Malarney, president of Vanguard Services (Tr. 702). Rathbun testified that at that time he told Robinson that things were getting "very serious" and that he wanted to speak to Malarney. He spoke to Malarney immediately after speaking with Robinson (Tr. 702) and told Malarney that "we were very interested in making a transition . . . and would like some reassurance from him that he could smooth the transition . . . with no disruption whatsoever in our service to our customers" (Tr. 703). As a result of this conversation, Rathbun directed Malarney to contact Vice President Sears (human resources) (Tr. 703).<sup>8</sup>

<sup>6</sup>The March 17 meeting of Krout, Owen, and Sears at which the initial alleged decision to subcontract was made was also outside Rathbun's presence. Rathbun is the vice president of M T and its chief operating supervisor.

<sup>7</sup>It was in this conversation that Freels speculated with Rathbun that if the Sidney drivers went for the Union, Respondent would get rid of the fleet (Tr. 727).

<sup>8</sup>On or about April 7, 1992, M T had signed a contract with Vanguard Services covering the employment of a temporary substitute for one of the Carlisle drivers who was disabled and on workman's compensation (Tr. 703-704). This contract was with Vanguard rather than with Drivers Inc. (Tr. 704). Rathbun testified that there had been a verbal agreement with Vanguard on April 7, but the contract did not get processed until April 22 (Tr. 706; Exh. 17).

Within a day or two, apparently on April 15, Rathbun met allegedly with Krout and told him of his discussion with Robinson in which Robinson told him that it would take about 2 weeks to implement Drivers Inc. taking over the Sidney driver operation (Tr. 717). Krout agreed. As a result of this conversation, Rathbun told Krout that he would get in touch with Robinson and tell him that "its a go" and to verify that they could do it in 2 weeks (Tr. 717-718). Rathbun testified that he then contacted Ron Robinson, told him that there had been a decision and that they were going to go with Drivers Inc. and needed reassurance on the exact timing, particularly how quickly Drivers Inc. could perform (Tr. 718). He also told Robinson that he wanted Drivers Inc. to give consideration to hiring the erstwhile Sidney drivers for employment by Drivers Inc. either in the same operation or "any where else they could utilize them" (Tr. 718).

Finally, Rathbun testified that on April 22 or 23, when Walden told him about the "rumor" of a union meeting scheduled for Saturday in Sidney, he immediately reported this to Sears (Tr. 720). He then met with Sears on the same day and discussed the object of trying to keep Respondents' business "as usual" (Tr. 721) and to avoid any disruption. The disruption he sought to avoid was \$70,000 per hour downtime at the Ford assembly plants which could be caused by untimely deliveries, including deliveries from M I. In particular, he was concerned about disgruntled drivers and the "lot of things that can happen" with disgruntled drivers obliged to make on-time delivery (Tr. 721). Rathbun testified that it was as a result of his conversation with Sears, that he met with the two drivers (Vestal and Grillot) on April 23 and asked them not to sign union cards.

#### Respondents Notify the Sidney Drivers of a May 2 Meeting

Starting on Wednesday, April 28, 1992, Walden by telephone or in person, commenced contacting the Sidney drivers, telling them of an important and mandatory driver meeting for Saturday, May 2, 1992, at the Holiday Inn in Sidney. On April 30, 1992, Walden posted a notice of the May 2 meeting. None of the drivers were notified of the May 2 meeting before April 28. Some of the drivers discovered the meeting on April 29 and one of them on April 30.

#### The Execution of the Agreement Between Drivers Inc. and Masland Transportation Allegedly on May 1, 1992

Drivers Inc. commenced its operation at the Sidney terminal on Sunday, May 3, 1992. There is no dispute that all Respondents' Sidney drivers, as will be hereinafter noted, were terminated at the Saturday, May 2, 1992 drivers meeting in Sidney.

The only evidence with regard to the date of actual signing of the agreement subcontracting the driver work from Masland Transportation to Drivers Inc. was the testimony of Vice President Rathbun. He testified (Tr. 86-87) that the written agreement subcontracting the Masland Transportation driver work to Drivers Inc. at Sidney, Ohio, was signed on May 1, 1992. It was with Rathbun on the witness stand and through his testimony, alone (Tr. 732-735), that the written subcontracting agreement (R. Exh. 18) between Drivers Inc. and Masland Transportation was identified, authenticated, and received in evidence.

That document, in fact, consisted of (1) a May 28, 1992 letter from Rathbun to Drivers Inc. president, James Malarney, wherein Rathbun forwarded to Malarney a copy of a signed contract, requested by Malarney from Rathbun in a Malarney letter of May 12, 1992; (2) the May 12, 1992 letter from Malarney to Rathbun enclosing two contracts, signed by Drivers Inc., for signature by Masland Transportation. Indeed, Malarney's May 12 letter requests that Rathbun: "Please return a signed copy of our files" (R. Exh. 18, p. 2). The face of the letter states that Malarney was "looking forward to meeting you in the near future." This indicates to me that, although the document purports to carry Malarney's and Rathbun's signatures, applied on May 1, Malarney had never met Rathbun as late as May 12, even after the alleged execution on May 1, 1992, by Rathbun for Masland Transportation. In any event, Malarney's May 12 letter to Rathbun, on the face of it, indicates that there had been no copy signed by M T for Drivers Inc. prior to May 12. Yet the face of the agreement, carrying "made this 1st day of May, 1992," carries both Rathbun's and Malarney's signatures. On the record evidence, and without further explanation by Respondents, the M T signature, Rathbun's, affixed to the Drivers Inc. subcontract, was affixed after May 12, 1992 (R. Exh. 18, p. 2). Indeed, as noted, Malarney had never met Rathbun prior to May 12, 1992 (R. Exh. 18, p. 2). The one sure fact is that, contrary to his testimony (Tr. 86), Rathbun did not sign the contract on May 1.

Lastly, there is the subcontract agreement itself. The critical elements of the agreement are (1) it recites that it was made on the "first day of May, 1992"; and (2) it is signed by James Malarney as president of Drivers Inc. and by John D. Rathbun, vice president of Masland Transportation, Inc.

The actual signature page is undated.

Consistent with the Rathbun letter to Malarney of May 28, 1992, wherein Rathbun attaches a signed contract pursuant to Malarney's May 12 letter; and, consistent with Malarney's May 12 letter to Rathbun, requesting that Rathbun return to Malarney a copy of the subcontracting agreement signed by Masland Transportation, I specifically find, contrary to Rathbun's testimony, that neither Rathbun nor any other representative of Masland Transportation or Masland Industries signed a subcontract with Drivers Inc. on May 1, 1992. Rather, I conclude that the signed agreement was executed on or after May 12, 1992; that Rathbun's testimony (Tr. 86) that it was signed on May 1 was deliberately false; that the purpose of that testimony was to show that there was a signed subcontracting agreement with Drivers Inc. (a) within the 2-week period following Rathbun's April 15 meeting with Krout where the sub-contracting decision allegedly was finalized, followed by the 2-week period allegedly mentioned by Robinson to Rathbun; and (b) before Masland Transportation terminated its 16 Sidney drivers on May 2 and before Drivers Inc. took over the operation on Sunday, May 3, 1992. I find, to the contrary, that Drivers Inc. took over the Sidney driver operation on May 3 without a signed contract; and that there was no 2-week period required by Drivers Inc. to take over the Sidney operation or any such conversation between Rathbun and Robinson on April 13 to 15.

In any event, the subcontract agreement provides (R. Exh. 18; par. 20, A) that the agreement becomes effective on the day that Drivers Inc. makes its employees available for M T's use; and that the term of the agreement is indefinite but

shall run until canceled by either party on 30 days' written notice prior to the date of termination (R. Exh. 18, par. 20, B).

By schedule A attached to the agreement, Masland Transportation agrees to pay to Drivers Inc. the wages, associated insurance, taxes, and fringe benefits (including vacations and holidays) pursuant to the Drivers Inc. contract proposal forwarded and dated on or about March 13, 1992, to Masland Transportation (R. Exhs. 15B and 15C). Thus, the wage rates and other terms agreed to by Masland Transportation (as evidenced by R. Exh. 18 integrated with R. Exhs. 15B and C) demonstrate that Drivers Inc. pays the drivers at a mileage rate of 29 cents per mile plus a waiting time and loading time rate of \$8 per hour, allowing one-quarter hour pay for pre and posttrip inspections. The agreement also provides for Masland Transportation to pay Drivers Inc. for payroll taxes; workers compensation insurance; 12 paid holidays; vacations (depending on length of employment at Masland Transportation); group life, accidental death, and major medical and dental insurance; a pension plan; and an "Administrative Fee" of \$30 per week per driver (R. Exh. 15(c)).

Rathbun testified that Respondents included that there be included in the subcontracting agreement an obligation on Drivers Inc. to offer employment, at the Sidney terminal or elsewhere, to all the terminated Sidney drivers (Tr. 746); that the reason for this demand was because the Sidney drivers were "productive employees" (Tr. 747); and that Respondents wanted former drivers to be "satisfied" because M T was in a service-oriented business and wanted no unhappy drivers interfering with the smooth and time-sensitive delivery service offered by M T.

#### Masland Transportation Terminates the Sidney Drivers on May 2, 1992

As above noted, Dispatcher Walden, commencing April 28, notified all Sidney drivers of an impending May 2 mandatory drivers meeting at the Holiday Inn on Saturday, May 2, 1992. He commenced notifying them no earlier than April 28 and notified some of them as late as April 30, 1 day before the meeting. On April 29 or 30, Rathbun directed Walden to post the notice of the May 2 meeting (Tr. 730).

At the May 2 meeting, with all drivers present, Rathbun read a prepared statement telling the drivers that, because of the economic situation and despite attempts of Masland Transportation to resolve the problems at Sidney, Masland Transportation was at an impasse with the drivers and it was no longer able to continue employing drivers at Sidney. Rathbun then told the drivers that Masland Transportation had subcontracted, and turned the operation over to, Drivers Inc.; that Drivers Inc. was present at the meeting and was prepared to take applications from the erstwhile Sidney drivers and would very seriously consider such applications. Rathbun then had Walden distribute to the 16 drivers written individual notifications of their being terminated (G.C. Exh. 8).

Later in the day, on May 2, driver Vestal, terminated along with the other drivers, telephoned Abel at his home and asked for a letter of recommendation from Abel for a prospective job with the City of Dayton or, alternatively, a job in Respondents' Sidney plant. Abel told him that there could be no job in the plant for him "due to the instructions he was receiving from Carlisle" (Tr. 368). Vestal never got

a job in the plant. Abel never sent him the letter of recommendation (Tr. 543). Abel testified that he never responded to either of Vestal's requests because he was so busy that he was "swamped" (Tr. 543). I do not credit this Abel testimony.

Violation of Section 8(a)(3); Respondents' May 2, 1992  
Termination of its 16 Sidney Drivers

Respondents do not deny, and the testimony of Rathbun and Abel demonstrates, that Masland Transportation and Masland Industries were dedicated to opposing unionization of its Sidney drivers. Such a position, of course, is not unlawful. In addition, as I have found above, however, Respondents engaged in several acts of independent violation of Section 8(a)(1) of the Act: unlawful promises to employees of benefits equal to benefits paid to unionized employees in Carlisle and Lewistown if they would forego unionization (John Rathbun); and Plant Manager Richard Abel unlawfully threatened to close the M T operation, unlawfully informed drivers of the futility of their organization and coercively interrogated them.

The General Counsel's Prima Facie Case

To prove a prima facie case of unlawful discharges, the General Counsel must first demonstrate that a motivating factor in Respondents' decision to terminate the 16 Sidney drivers on May 2, 1992, was their union activities. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 400-401 (1983). Respondents, in defending against such a prima facie case, must either then rebut the prima facie case by showing that the facts, as demonstrated by the General Counsel, never happened; and in this regard, Respondents must bear the burden of proof by a mere preponderance of the credible evidence, *Merillat Industries*, 307 NLRB 1301 (1992); or, in the alternative, again by a preponderance of the credible evidence, that Respondents must establish that they would have taken the same action against the 16 drivers regardless of any protected activity the drivers engaged in. *NKC of America, Inc.*, 291 NLRB 683 fn. 4 (1988). In drawing an ultimate inference of the Respondents' alleged unlawful motivation under *Wright Line*, above, that inference, based on a preponderance of credible testimony, may be drawn from the Respondents' hostility toward the drivers' union activities and the coincidence between such union activities and the date of the discharges. *Lemon Drop Inn v. NLRB*, 752 F.2d 323 (8th Cir. 1985); *NLRB v. Minette Mills*, 139 LRRM 1349 (4th Cir. 1993), enfg. 305 NLRB 1032 (1991). The employer's burden to prove that, notwithstanding the drivers' union activities, it would have terminated their employment regardless of such activities, effectively imposes an affirmative obligation on the employer to convince the trier of fact that the legitimate motive for the discharges existed and was sufficiently compelling, *NLRB v. Horizon Air Services*, 761 F.2d 22 (1st Cir. 1985).

The first element in proving an unlawful motive is the General Counsel's obligation to prove that Respondents had knowledge of the employees' union activities prior to the May 2 discharges. In the instant case, Rathbun and Sears testified that as early as the Tuesday (April 21) following the

Union's April 18 letter informing the drivers of the April 25 meeting, both Sears and Rathbun were told by John Walden of the impending Saturday, April 25 union meeting. In addition, Union Agent Clemmens' two telephone calls requesting recognition to Abel and Sears on the early afternoon of April 27 also demonstrate that Respondents had knowledge of the drivers' Teamsters union activities preceding the May 2 discharges.

Another element often suggested by the Board and the Courts in determining the existence of unlawful motive is the existence of employer animus against the employees' union activities. I have found that Respondents were dedicated to obstructing the Sidney drivers from seeking union representation and committed acts of unfair labor practice in support of that position. Whether or not Respondents committed these independent unfair labor practices, however, Respondents admitted to their desire to keep the Union from representing the Sidney drivers. I find, however, that Respondents' union animus spilled over into the above-noted unlawful acts of coercive interrogation and unlawful threats and promises. As the Board and Court cases repeatedly observe, there is also the question of the coincidental timing of the discharges.

The Question of Timing

In *NLRB v. Rain-Ware, Inc.*, 732 F.2d 1349 (7th Cir. 1984), the court noted that the employer received a union demand for recognition on September 9 and laid off four employees on September 10 and 11. In that case, the court found that the employer, as here, had previously engaged in coercive interrogation and unlawful threats. In view of such findings, and in view of the coincidental timing of the four terminations (perfected on the day after and 2 days after the demand for recognition), the court stated that: "Timing alone may suggest anti-union animus as a motivating factor in an employer's action" [citing cases]; *NLRB v. Rain-Ware, Inc.*, 732 F.2d at 1354. Similarly, the Board, in *Equitable Resources Exploration*, 307 NLRB 730 (1992), found that the timing of the employer's layoffs of employees (1 week after the union won an election and 2-1/2 months after the commencement of union organizing activities), in the presence of independent acts of unlawful restraint and coercion, proved a prima facie case: that the employees' union organizing activity was a motivating factor in the employer's decision to lay the employees off under the *Wright Line* theory. I therefore conclude that, in the instant case, where Respondents engaged in unlawful interrogation and made unlawful promises and threats to the drivers in the period commencing February 21, 1992, and ending on April 23, 1992; and where Respondents received the Union's demand for recognition on Monday, April 27, the timing of the May 2 discharges creates a prima facie case of unlawful terminations. As noted in *NLRB v. Rain-Ware, Inc.*, supra, "timing alone May suggest anti-union animus as a motivating factor." Where, as here, timing of the discharges, 4 days after receipt of the Union's recognition demand, is conjoined with independent unfair labor practice preceding the discharges, the existence of a prima facie case cannot be doubted. I therefore find that the General Counsel proved a prima facie case that Respondents, by virtue of their May 2 discharge of all 16 Sidney, Ohio drivers, violated Section 8(a)(3) and (1) of the Act, as alleged.

An interesting, but not dispositive, question is whether Respondent *decided* to terminate the employees following its April 21 acquisition of knowledge of the impending Saturday union meeting (April 25) or whether it decided to terminate them only after receiving Union Agent Clemmens' abortive demands for recognition on Monday, April 27. For prima facie case purposes, it is largely immaterial which of the two events motivated Respondents' terminating the employees. It is particularly noteworthy, however, that Respondents, having acquired actual knowledge on April 21, neither notified the drivers of any meeting nor posted any notice of any driver meeting in the period Monday, April 21, 1992, through Saturday, April 25, 1992; nor did they notify any of the drivers of any meeting on the following Monday (April 27). A more lengthy notice of the May 2 meeting would not have undermined the secret object of the meeting. Respondents had already allegedly decided to terminate drivers as early as April 15. The telephone calls to the drivers, notifying them of the May 2 meeting, however commenced April 28, the day after Clemmens' telephone calls. Only two events stand out as occurring after Abel's and Rathbun's acquisition of *knowledge* of the drivers' union activities on April 21: on April 23 or 24, Rathbun was unlawfully promising to the Sidney drivers the benefits of Carlisle's union wages and operating procedures if they would forego signing union cards at the approaching April 25 union meeting; and, on April 27, Clemmens twice telephoned recognition requests to Abel and Sears and was told that the object of his calls was known and that Clemmens was to "do what he had to do." Both Sears and Abel refused to speak to him. The next event, starting the next day (Tuesday, April 28) was Respondents' notifying the drivers of the approaching May 2 meeting.

It is not entirely idle speculation, therefore, to conclude, as I do, that Respondents, possessed of considerable union animus, were not stampeded into a decision to terminate the drivers when, on April 21, they learned of the approaching April 25 union meeting. Rather, it seems to me that Respondents decided to await the outcome of the meeting: to determine whether the employees, in fact, would sign cards for the Union or might reject the Union as driver Vestal's testimony suggested (April 23 conversation with Rathbun describing a meeting of drivers *before* the April 25 union meeting where, after showing the drivers Respondents' Carlisle union contract and operating procedures and voicing Rathbun's promise of granting unionized benefits, "we won't even have to worry about voting or signing cards or talking to the union" (Tr. 361-362)). This conclusion is also supported by the testimony of driver Alfred Grillot (conversation with Abel April 23, "I don't see how it can present a problem if we're just going to an informational meeting and listen to what the [union] man has to say" (Tr. 435)).

But any such dilatory, watchful, and conservative approach concerning what the Sidney drivers would do (or had done) on April 25 was eliminated by Union Agent Clemmens' telephone calls of April 27. On the next day, April 28, Dispatcher Walden commenced notifying the drivers of the mandatory May 2 meeting and on the following day posted the notice thereof. It would seem to me, therefore, and I find, that the *decision* to terminate the drivers was made immediately upon (i.e., the afternoon of April 27 or the morning of April 28) receipt of Clemmens' telephone calls on April 27. I find that the absolute proximity between the April 27

or 28 *decision* to terminate the employees following the April 27 demands for recognition, alone, establishes a prima facie case, *NLRB v. Rain-Ware, Inc.*, supra. Respondents have not rebutted this prima facie case either by showing that the General Counsel has not proved facts, on their face, sufficient to constitute a prima facie case or that Respondents' evidence has rebutted the veracity and accuracy of the General Counsel's witnesses with regard to *knowledge*, *timing*, and *union animus*. If timing, alone, can create a prima facie case, as the court held in *NLRB v. Rain-Ware, Inc.*, then in conjunction with knowledge, union animus, and independent unfair labor practices, the prima facie inference of unlawful motivation has been proven here by a preponderance of credibly evidence.

#### Respondents' Defenses to the Prima Facie Case of the Unlawful Discharges of May 2, 1992

Respondents defend on three grounds, the first two of which relate to the General Counsel's alleged failure to prove a prima facie case. I have found to the contrary and to that extent reject Respondents' defenses. Lastly, and perhaps basically, Respondents defend on the acceptable theory that, even if the General Counsel carried the burden of prima facie proof, the evidence showed that Respondents terminated the drivers without regard to their union activities (R. Br. 27).

##### A. Credibility

As a preliminary matter, in observing Respondents' witnesses and the quality of their testimony, along with the written evidence adduced by Respondents, Respondents' case was marked by (1) a defense based substantially upon intramural conversations and wholly internal decisions and activities by Respondents' officers without contemporaneous outward manifestation of those decisions affecting the employment of the Sidney drivers. Indeed, Respondents' defense is based, in part, on the implicit deceit (justified by alleged business considerations) of misleading the drivers into believing that their services would be retained with the imposition of a mileage pay rate system commencing July 1, while having already decided on subcontracting; (2) Respondents' witness Abel's testimony was marked by repeated lack of recollection and falsely asserted incomplete memory of the time and substance of events; the testimony of Rathbun was marked by false testimony (the date of his signature on the subcontracting agreement as May 1, 1992); his denial of nodding assent to "bumping" rights; (3) a lack of testimonial and documentary corroboration by Respondents' supervisors present at important occurrences and (4) the general implausibility of Respondents' version of events. *NLRB v. Advance Transportation Co.*, 979 F.2d 569 (7th Cir. 1992), enf. 300 NLRB 569 (1990).

In this regard, there is simply no testimony from Rathbun, or from any other source, that Rathbun actually signed the contract on May 1, 1992. The documentary evidence submitted by Respondents demonstrates that this was not true (R. Exh. 18) and that no Respondent signature was affixed to any subcontract agreement until after May 12, 1992.

In addition, General Counsel's witnesses Meinberg and Donnie Freels testified on Plant Manager Abel's February 21 threat, the elimination of the M T fleet if the drivers sought union organization. Abel's contrary responsive testimony:

that he told them that the loss of the Ford contract would be due to Respondent's bidding its true cost of doing business, was unconvincing. In addition, there is no legal inconsistency between the two versions if, as I have found, Abel predicated the advent of a new bidding procedure on the drivers seeking to unionize. The unlawful threat remains. As the General Counsel notes, Respondents supervisor, Walden, was a witness to this conversation and was not called to corroborate Abel's version of bidding on the Ford contract. Similarly, Walden repeatedly having no recollection, was also not called to corroborate Abel's contrary version of Donnie Freels' testimony concerning the March 9 coercive interrogation ending with Abel's noting no "future" in the drivers being organized and "Respondents' very dim view of unions."

I also was not impressed with Abel's testimony concerning the April 11 meeting in which the subject of employee "bumping into the plant" was raised by the drivers. Although he remembered driver Poppleman's outburst flowing from Abel's allusion to, and implied criticism of, the drivers' "motivation," he could only recall that "some of the drivers" said they did not believe his "numbers" and "a number of drivers" said that they did not like the mileage system with reductions in their pay and Respondents' failure to reduce cost (Tr. 535-536). My observation of Abel and my review of the record causes me to disbelieve his testimony that a number of drivers said any such thing. Abel could not identify a single driver other than Poppleman, who made any such remarks. I find that they were not made regardless that there were frequent, loud remarks. I also discredit his testimony that Poppleman said that he was displeased about going to the mileage system (Tr. 533).

With regard to "bumping into the plant," the credibility of Abel's testimony is unacceptable. He testified that one of the drivers asked: "if we lose our jobs, can I bump into the plant?" (Tr. 538.) Typical of Abel's equivocal testimony, he testified that, while he could not recall his exact words, his response was that he did not know the answer; that he had never been involved in a situation where a supplier was at the facility that he managed; and that he would check into it. I discredit this testimony. The credible testimony of the General Counsel's witnesses is that he said that Respondents would observe the seniority of the employees for purposes of bumping into the plant; that he turned to Rathbun for acquiescence; and that Rathbun, by shaking his head in the affirmative, agreed that the employees could bump into the plant.

In addition, when, because of the anticipated mileage pay system, the employee raised the question of bumping if there was not enough work for them as drivers (because there were more drivers than trucks), Abel first testified that he had no recollection of such question being raised (Tr. 589). When the question was repeated (Tr. 589), he admitted that there was an issue brought up about bumping into the plant (Tr. 590). Most important, Abel denied that the bumping issue raised by the drivers was "bumping" because there was not enough work for 16 drivers to drive only 11 trucks (Tr. 590). He testified rather that he *construed* that the "bumping" was brought up, not because the drivers perceived an anticipated lack of work, but because they wanted an alternative to working under the new mileage pay rate: that if the drivers did not "like your [mileage pay] system do I have another choice" (Tr. 590). While he admits that no driver mentioned

such a question, he testified that that is what he construed the bumping issue to mean. Such testimony is mere fabrication. The driver inquired of "bumping" rights because he feared a lack of work, not a distasteful pay rate.

I have discredited his *lack of recollection* that the bumping question was raised; I have discredited his *denial* that the bumping issue was raised because an employee was concerned that there might not be enough work for 16 drivers driving only 11 trucks; and I discredit his improvised explanation as to what he *construed* the question to mean (Tr. 590). Lastly, I discredit his testimony that he never got back to driver Vestal who requested a plant job (i.e., "bumping") because he was "swamped" with work. Contrary to Abel's denials and explanations (Tr. 542), I credit driver Vestal's testimony that, on May 2, 1992, Abel told him that he could not bump into the plant "due to the instructions he was receiving from Carlisle" (Tr. 368). Therefore based upon Abel's demeanor, his repeated lack of ability to recall events, his attempt to think through the consequences of a question before answering it (Tr. 539), his inability to specify names of drivers who made incriminating statements, and his repeated desire to impress me that, as plant manager for Masland Industries, he was meddling in the labor relations of Masland Transportation's drivers only as a "consultant," I do not credit any of his testimony, particularly where it is inconsistent with the testimony of the General Counsel's witnesses. Rather, such discredited testimony supports the prima facie case and strengthens the inference of unlawful motivation.

Respondents' defense, that regardless of the drivers' union activities, it would have terminated them in any event, also rests on the credibility of the testimony of its witnesses Krout, Sears, and Rathbun.

#### B. Respondents' Argument

Respondents argue that they long "contemplated" the termination of the drivers and the subcontracting of their jobs. I agree but stress the word "contemplated."

The substance of Respondents' defense derives from their January and March 1992 correspondence, and February and April conversations, with representatives of Drivers Inc. and Vanguard Services. It also points to the April agreement with Vanguard covering a temporary replacement for a disabled Carlisle driver. Respondents argue that it therefore was not suddenly thrust into the arms of Drivers Inc. in order to evade the drivers' April unionization effort. The above activities allegedly support that argument and Respondents' innocent execution of the subcontracting agreement with Drivers Inc. sometime in May.

In between, however, is the matter of uncontradicted union activity: the Saturday, April 18 letter from the Union to the employees of which Respondents had notice by Tuesday, April 21; and the April 27 union telephone calls to Respondents requesting recognition, ending with Respondents' actual receipt of the Union's election petition on May 1. In addition, there were the four meetings (February 8, 14, 21 and April 11) with unit employee committee wherein Respondents' sole manifested objective was to retain the M T drivers by saving money on labor costs: selling them on accepting the mileage rate. Respondents' manifested conduct was thus diametrically opposed to their alternative option of terminating the drivers and subcontracting their jobs.

Respondents argue that they attempted to retain the drivers as late as the April 11 meeting when Vice Presidents Owen and Krout acceded to Vice President Sears' desire to make one last effort at gaining driver cooperation. Krout testified that it was actually a poor risk because, by March 17, they had already decided to terminate the drivers and subcontract.

First, Respondents argue, on the basis of the wholly intramural testimony of Rathbun, recounting his experiences to Sears and Krout, that the April 11 meeting was a failure because the employees rejected Respondents' final mileage rate overtures. There is no factual support for the conclusion that the drivers rejected Respondents' offer. Poppleman's loud displeasure must be measured against (1) no driver rejected the mileage pay rate; (2) no driver threatened to quit if the hourly rate was removed; and (3) I doubt that Respondents, even in the face of open driver resistance, would have failed to impose the mileage pay rate (and other necessary savings) on the drivers regardless of their wishes. Krout admitted that the drivers were never given the choice of accepting Respondents' terms or face the subcontracting of their jobs. To the extent that Sears and Krout testified that they would continue employment of the drivers only if Respondents' offer were "enthusiastically" accepted, I do not credit such testimony. Not only are business decisions not ordinarily made on the basis of employee desires, but Respondents' preference to retain their otherwise "disgruntled" exemployees in the guise of Drivers Inc. employment militates against Respondents' position. This will be examined below.

Second, there is simply no objective evidence to support Respondents' argument that after April 11, they took steps to execute their March 17 decision to terminate the drivers and subcontract to Drivers Inc. Support for this argument is based principally on the testimony of Rathbun, Sears, and Krout. Rathbun, first meeting with, and recounting the drivers April 11 rejection to, Krout and Sears, points to a subsequent lengthy luncheon meeting with Krout on April 14 or 15 at which Krout gave the final word to terminate the drivers and subcontract to Drivers Inc. The most important, and least convincing, evidence on which Respondents rely to support this fact is the testimony of Rathbun.<sup>9</sup> He testified that he then immediately contacted Drivers Inc. (Ron Robinson), and specified Respondents' decision to subcontract to Drivers Inc. Rathbun testified that Robinson *told him* that there would be a 2-week waiting period before Drivers Inc. could take over the Sidney operation. It must be emphasized that such hearsay testimony (what Robinson told Rathbun) is the keystone in the arch that supports Respondents' entire defense. If there was no 2-week waiting period, then there was no reason why Drivers Inc. failed to take over the "hemorrhaging" Sidney trucking operation within a few days of Rathbun's April 14/April 15 telephone call to Ron Robinson.

<sup>9</sup>Rathbun admits to deceiving Donnie Freels, in a conversation after April 11 (and before April 25) wherein Freels asked him (Tr. 316) if Respondents had decided on the money in the new payrate system. Rathbun said that while there was nothing concrete, it was generally 29 cents a mile, a 2-cent bonus and \$7.25-an-hour waiting time. Rathbun testified that he purposely refrained from revealing the decision to terminate the drivers for fear of resulting interference from disgruntled driver-employees. On this latter point, see *infra*, in the text. In any event, Respondents submitted no evidence that on and after their subcontracting of May 1992 they saved any money or cut their transportation losses.

Without the alleged 2-week delay, Respondents May 2 discharges are necessarily swallowed up by the *timing* of the Union's April 27 telephone calls and Respondents' sudden April 28 notification of the May 2 meeting.

I would ordinarily be reluctant to credit hearsay, in the face of a strong *prima facie* case, to prove the essential element of a defense, required to persuade by a ". . . preponderance of the credible evidence." *Merrilat Industries*, 307 NLRB 1301 (1992). To accord *any* probative weight, however, to hearsay on such a critical, indeed vital, element flowing, as here, from a witness as unreliable as Rathbun places the point out of the bounds of discretion. While the establishment of the fact of the alleged "two week delay" imposed by Drivers Inc., under ordinary business circumstances and common sense, would call for Respondents to secure (or explain away the failure to secure) the corroborative testimony of Ron Robinson, or some other competent Drivers Inc. agent, I draw no adverse inference from this omission. The rule, as it now stands, still arguably seems not to permit such an adverse inference, *International Automated Machines*, 285 NLRB 1122 (1987); *Rangaire Acquisition Corp.*, 309 NLRB 1043 fn. 3 (1992); nor do the surrounding circumstances require an adverse inference to support the discrediting of Rathbun. I do not credit his hearsay testimony of what Robinson told him concerning a 2-week delay.

Rathbun testified (Tr. 696-704, 717, 768) at length that, as above noted, around April 13 or 14, he met with Sears and Krout, told them of the poor driver reception on April 11 and was told to fix the problem and pursue the Drivers Inc. proposal. He then, according to his hearsay testimony, after meeting at lunch with Krout, allegedly telephoned Drivers Inc., spoke to Ron Robinson, received the 2-week delay information (after inquiring how quickly Drivers Inc. could take over the Sidney operation) and was told, on the same day, to contact Jim Malarney, an officer of Vanguard Services, Inc. After speaking to Malarney, Rathbun testified that he put Malarney in touch "with Mr. Rick Sears, our [sic] Human Resources vice-president" (Tr. 703) (Sears holds no office in Masland Transportation) and that Sears and Krout then became involved in the subcontracting operation (Tr. 719). How did they become "involved"? Where are the notes of any conversations, between April 14 and May 1, between Krout (Rathbun's superior) and/or Sears and Drivers Inc./Vanguard Services? If there were no notes, where are the telephone bills or calendar notations supporting the existence any such telephone or personal conversations. And Vice President Sears, charged with all M T's labor contract negotiations, the alleged inveterate notekeeper (Tr. 764), where are his notes of conversations with Drivers Inc., or anyone else, leading to the alleged May 1 subcontract with Drivers Inc.? In short, the circumstances surrounding Respondents' post-April 11 conduct do not persuade me that Respondents decided to terminate the 16 drivers and subcontract the Sidney operation in the period April 14-21, 1992. Nor am I persuaded that Respondents made the decision regardless of their drivers union activities. That was Respondents' burden and they failed to support that burden. *Wright Line*, *supra*; *NLRB v. Transportation Management Corp.*, *supra*.

Further, I do not credit that Respondents' April 23 actions in cautioning drivers not to sign union cards constituted mere prudence in not disclosing that the *decision* to terminate and subcontract had already been made. Rather, Abel's and

Rathbun's April 23 actions are consistent with Respondents' having *not* decided to terminate the drivers and having already agreed to subcontract their jobs.

Moreover, another circumstance is instructive. Respondents, according to Rathbun (Tr. 721), kept the subcontracting and terminations secret because Respondents feared disruption in the scrupulously delicate delivery service to Ford. The disruption, according to Rathbun, would come from M T drivers who would become "disgruntled" if given the news. On the other hand, Respondents took pains, in the subcontract itself, to require Drivers Inc. to offer employment to the erstwhile M T drivers on the same routes they had previously driven. This would insure continued, uninterrupted service from experienced, capable drivers. But the terms of employment, at Drivers Inc., particularly the Drivers Inc. 29-cent-per-mile pay rate, was less than the 30- or 31-cent-per-mile rate (Tr. 686) Respondents had offered the same drivers on and after April 11. If the M T drivers actually hired on with Drivers Inc. at 29 cents per hour, they might be expected to be less happy than at the 30 cents per mile, previously offered by Respondents and allegedly rejected by the same drivers. Apparently, Respondents were not overly concerned with "disgruntled" drivers. But the drivers, whether disgruntled or happy, were not the ultimate concern. Respondents, though it wanted the M T drivers to be driving as Drivers Inc. employees, did not want the Union.

Another circumstance points to Respondents' unexplained haste following the Union's demand for recognition (April 27). Assuming, *arguendo*, that Respondents made the decision to terminate the drivers on April 15 and knew, by April 15, that Drivers Inc. could not assume the Sidney terminal operations for 2 weeks, why was the first notice to the drivers of the May 2 meeting given to the Sidney drivers as late as April 28? Why was notice of the mandatory May 2 meeting not given a week before, i.e. April 25, or even as late as Monday, April 27? And why not *posted* on the first day; why were there only telephone messages on Tuesday, April 28? A full week's *notice* of the meeting surely would not have compromised the secret purpose of the meeting. The reason for the sudden, hasty telephone notices to the drivers, beginning oddly on Tuesday, April 28, is Clemmens' April 27 afternoon telephone calls (demanding recognition). The decision to terminate the drivers at the May 2 meeting was made on or after April 27, not on April 15. In the presence of Respondents' admitted union animus and consequent independent unfair labor practices and their unpersuasive defense, I again focus on the *timing* of the discharges. To believe that the sudden April 28 notices to the drivers and the May 2 discharges were unconnected to the April 27 union demands for recognition is to believe in "tooth fairy" coincidences. *NLRB v. Horizon Air Services*, 761 F.2d 22 (1st Cir. 1985). I am not obliged to do so *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466 (9th Cir. 1966).

All of the above leads me to conclude that Respondents were concerned with the annual M T \$200,000 transportation loss, much of which could be traced to the unique hourly pay rate enjoyed by the Sidney drivers; that Respondents did embark on a two-path solution to the problem: keep the M T unit drivers at decreased labor costs (i.e., by virtue of the savings in the mileage pay rate), or terminate the drivers and use a subcontractor like Drivers Inc.; that, as of the April 11 meeting and thereafter, Respondents made no immediate ef-

fort to contact Drivers Inc.; that they learned of the union activities of the Sidney drivers on April 21; that, for reasons previously appearing in this decision, they took no immediate action but awaited information on the outcome of the April 25 union meeting; that, on April 27, Respondents received the Union's request for recognition; and that Respondents then embarked on the path of immediately securing Drivers Inc.'s services.<sup>10</sup> I further find that the subcontract, bearing the apparent execution date of May 1, 1992, was executed on or after May 12, 1992; that the apparent date (May 1) was used in order to untruthfully conform to and support Respondents' assertions (1) that there was a 2-week delay in Drivers Inc. takeover after the April 15 decision to terminate and subcontract; and (2) that Respondents set in motion the termination of the Sidney drivers and the subcontracting on April 15, 1992, long before the onset of the drivers' April union activities and, in any case, before Respondents' April 21 acquisition of knowledge of the approaching April 25 union meeting. I find, therefore, that the preponderance of credible evidence discloses that it was Union Agent Clemmens' April 27 requests for recognition that caused Respondents to terminate the 16 drivers and to subcontract the Sidney operation rather than the reasons assigned by Respondents and that Respondents' jointly and severally thereby violated Section 8(a)(3) and (1) of the Act, as alleged.

Alternatively, even if Respondents' decision to terminate and subcontract was prompted by their admitted April 21 acquisition of knowledge of the impending April 25 union meeting, such a decision, and the actions subsequently taken, would similarly violate the same sections of the Act.

I necessarily reject Respondents' defense that they would have terminated the drivers and subcontracted the Sidney operation regardless of the drivers' union activities.

#### CONCLUSIONS OF LAW

1. Masland Industries, Inc. and Masland Transportation, Inc. and each of them is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Masland Industries, Inc. and Masland Transportation, Inc., since August 1991, and continuing at all material times, constitute a single-integrated business enterprise and are a single employer (Respondents) within the meaning of the Act.

3. Teamsters Local Union No. 908, affiliated with the International Brotherhood of Teamsters, AFL-CIO (the Union) has been and is a labor organization within the meaning of Section 2(5) of the Act.

4. Respondents, by and through their supervisors and agents Richard Abel and John Rathbun, in the period February 21 through April 23, 1992, unlawfully promised Respondents' employees, their Sidney, Ohio drivers, the same benefits as certain other of their employees if they refrained from attempting to have the Union become their collective-bargaining representative; unlawfully threatened employees with cessation of the Sidney fleet operations if they attempted to have a union become their bargaining representative; coercively interrogated them concerning the union sym-

<sup>10</sup> It is not entirely gratuitous to note that the technique of terminating employees and rehiring them as "leased" workers has been reported to be, historically, a "union-busting" device. *Nations Business*, November 1992, p. 21.

pathies of other employees; and informed them that it would be futile for them to select a union as their collective-bargaining representative, each of which actions restrained and coerced employees in violation of Section 8(a)(1) of the Act.

5. By discharging, on May 2, 1992, their 16 driver-employees at their Sidney operation, including Wayne B. Borland, Mark Egbert, Donnie R. Freels, Alfred H. Grillot, Dennis L. Kitchen, Frederick D. Poppleman, Ernest L. Vestal, Bill Broering, Scott R. Egbert, Warren A. Freels, George J. Grillot, Jack Meinberg, and Neal Schaffer, because they, and each of them, engaged in union activities, and in order to discourage employees from engaging in such activities, Respondents have unlawfully discriminated against each of them and have engaged in and are engaging in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.

#### THE REMEDY

Having found that Respondents engaged in unfair labor practices in violation of Section 8(a)(3) and (1) of the Act, I shall recommend to the Board that it order Respondents to cease and desist therefrom and, jointly and severally, to take certain affirmative action to effectuate the policies of the Act. In addition to posting notices which prohibit repetition of Respondents' violations of Section 8(a)(1) and (3) of the Act, I shall recommend that Respondents be obliged to offer immediate reinstatement to all of their 16 Sidney, Ohio drivers, the discriminatees herein, to their former jobs at the Sidney, Ohio location, which, continuing as a transportation terminal, is now operated by Drivers Inc. Masland Transportation, itself, continues to exist and to employ 21 drivers at Carlisle and 9 at Lewistown. This is therefore not a case of reopening a closed terminal or reestablishing a trucking operation. *Mid-South Bottling Co. v. NLRB*, 876 F.2d 458 (5th Cir. 1989). The trucking facility at Sidney, Ohio, exists as it did before except that Drivers Inc. employs the drivers rather than Masland Transportation. The rehiring of the 16 drivers by Masland Transportation would not appear to be "unduly burdensome" or "unfair" *Teamsters Local 171 v. NLRB*, 863 F.2d 946, 957-958 (D.C. Cir. 1988); *Mid-South Bottling Co. v. NLRB*, supra. Certainly, Respondents have failed to submit evidence thereof before me. *Coronet Foods v. NLRB*, 981 F.2d 1284 (D.C. Cir. 1993). The most that can be said is that Respondents will be obliged to exercise their rights to cancel their contract with Drivers Inc., as provided in the agreement, on 30 days' written notice. The cost of such cancellation, if any, must be borne by Respondents as part of the fruits of their engaging in unfair labor practices. There has been no showing that Respondents' long-term leases on the trucks were in any way affected by their subcontracting to Drivers Inc. The leases exist; the leased trucks exist; Respondents' remain obliged as lessees under the leases as they were prior to the unfair labor practices and, to the present time, as far as the record shows. Ultimately, Respondents are free to urge "undue hardship" in compliance proceedings. *Coronet Foods v. NLRB*, supra.

Of particular significance, the Board, in *Jay Foods*, 228 NLRB 423 (1977), found no undue burden in ordering resumption of operations of the employer notwithstanding that, as in the instant case, resumption required the cancellation of subcontracts on 30 days' notice. To not require Respondents to rehire the employees and reengage in their old business

would effectively permit Respondents, as in *Jay Foods*, supra, to be rewarded for their own unlawful actions since the employees employed by the subcontractor (Drivers Inc.) are not represented by any labor organization and Respondents would have successfully and unlawfully evaded their statutory obligation to permit their employees to be union members pursuant to their expressed desire. As in *Jay Foods*, and *Schorr Stern Food Corp.*, 248 NLRB 292, 300 (1980), the object of requiring the resumption of former operations is to reestablish that status quo ante to the extent necessary to provide jobs for the employees who desire reinstatement and employment, *Jay Foods*, supra at 424. Since the subcontracting here, as in *Jay Foods*, was unlawfully motivated and may be avoided without undue hardship on Respondent, I shall recommend that Respondents cancel the Sidney subcontract with Drivers Inc., offer immediate reinstatement to the discharged drivers in their old jobs or, if those jobs no longer exist, offer immediate reinstatement to substantially equivalent jobs, and reestablish their trucking operations in Sidney, Ohio, as they previously existed as of May 1, 1992. See, generally *St. John's Construction Corp.*, 258 NLRB 471, 481-482 (1981).

In addition to obliging Respondents to cancel the May, 1992 Sidney subcontract with Drivers Inc., or any amendment, renewal or modification thereof, to offer reinstatement to their unlawfully terminated 16 drivers and to resume the trucking operations as they existed prior to May 2, 1992, I shall also order that the reinstatement of 16 drivers be without prejudice to their former seniority and other rights and privileges previously enjoyed. Further, I shall recommend to the Board that Respondents, jointly and severally, make each of them whole for any loss of earnings and benefits each of them suffered because of the unlawful May 2 discharges, less any net interim earnings. The backpay obligation, however, shall be measured as follows: Respondents will be obligated to pay each of the discharged drivers at the rate of the hourly pay enjoyed by such drivers, together with all benefits, for the period May 2 through June 30, 1992. I have found, above, that Respondents lawfully planned to switch to the mileage pay rate on July 1, 1992. For the period July 1, 1992, and following, Respondents will be obliged to make whole each of the 16 drivers for any loss of earnings and benefits based upon mileage pay and benefits which Respondents offered to the 16 Sidney drivers in the April 11, 1992 meeting. Those benefits shall include the plant "bumping rights" which Plant Manager Abel and Vice President Rathbun delineated at the April 11 meeting as found in the credited evidence herein.

While the general configuration of Respondents' April 11 offer to the drivers was at a mileage rate of 30-1/2 cents per hour with \$7.25 per hour for delay time (Tr. 697), a full and more accurate definition of the April 11, 1992 offer to the 16 Sidney drivers may be made at a compliance proceeding hearing, if necessary. Backpay, whether based upon the hourly rate between May 2 and June 30, 1992, or the offered mileage rate commencing July 1, 1992, will be otherwise computed in the manner established by the Board in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these finding of fact and conclusions of law, and on the above record, I issue the following recommended<sup>11</sup>

### ORDER

The Respondents, Masland Industries, Inc. and Masland Transportation, Inc., Sidney, Ohio, and each of them, and their officers, agents, successors, and assigns, jointly and severally, shall

1. Cease and desist from

(a) Discharging, subcontracting jobs, or otherwise discriminating against, employees in order to discourage them from joining or supporting Teamsters Local Union No. 908, affiliated with the International Brotherhood of Teamsters, AFL-CIO (the Union), or any other labor organization.

(b) Promising employees benefits if they refrain from choosing the Union, or any other labor organization, as their collective-bargaining representative; threatening employees with cessation of operations if they attempt to have a labor organization become their collective-bargaining representative; coercively interrogating employees about employees' union sympathies; or informing employees that it will be futile for them to select the Union or any other labor organization as their collective-bargaining representative.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer to each of their 16 driver-employees terminated on May 2, 1992, employed at the Sidney, Ohio location, including Wayne P. Borland, Mark Egbert, Donnie R. Freels, Alfred Grillot, Dennis L. Kitchen, Frederick D. Poppleman, Ernest L. Vestal, Bill Broering, Scott R. Egbert, Warren A. Freels, George J. Grillot, Jack Meinberg, and Neil Schafer immediate and full reinstatement to their former positions as

drivers at the Sidney, Ohio location or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, and make each of them whole, with interest, for any loss of earnings and benefits each of them may have suffered as a result of Respondents' May 2, 1992 unlawful discharge of these employees as set forth in the remedy section of this decision.

(b) Reestablish their trucking operations at Sidney, Ohio, as such operations existed on May 2, 1992, severing any and all subcontracting agreements and operations covering the Sidney trucking operation.

(c) Preserve and, on request, make available to the Board, or its agents, for examination and copying, all subcontracts, payroll records, bank statements, truck leasing agreements, notes and records regarding Respondents' April 11, 1992 wage and benefit offer to their Sidney, Ohio drivers, social security payment, records, timecards, personnel records and reports, and all other records necessary to facilitate the effectuation of this Order.

(d) Post at its Sidney, Ohio office, dispatch office, and manufacturing facility copies of the attached notice marked "Appendix."<sup>12</sup> Copies of said notice, on forms provided by the Regional Director for Region 9 after being duly signed by an authorized representative of Respondents, shall be posted by Respondents immediately upon receipt thereof, and be maintained by them for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondents to ensure that said notices are not altered, defaced or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of the Order what steps Respondents have taken to comply.

<sup>11</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

<sup>12</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."